

ORBIT - Online Repository of Birkbeck Institutional Theses

Enabling Open Access to Birkbeck's Research Degree output

From jurisdiction to juriswriting: deconstruction at the limits of the law

<https://eprints.bbk.ac.uk/id/eprint/40112/>

Version: Full Version

Citation: Matthews, Daniel (2015) From jurisdiction to juriswriting: deconstruction at the limits of the law. [Thesis] (Unpublished)

© 2020 The Author(s)

All material available through ORBIT is protected by intellectual property law, including copyright law.

Any use made of the contents should comply with the relevant law.

FROM JURISDICTION TO JURISWRITING: DECONSTRUCTION AT THE LIMITS OF THE LAW

Submitted for the degree of Doctor of Philosophy of the
University of London

July 2014

Daniel Matthews

School of Law
Birkbeck, University of London

Declaration Against Plagiarism

I confirm that all the text and analysis contained in this dissertation, unless properly attributed and acknowledged, is my original work.

Signed:

Abstract

Juris-diction is the “speaking of the law,” the performative and enunciatory mode of normativity. As the expressive register of the law, jurisdiction names practices for declaring, showing and determining the limits and possibilities of legality. Read in these terms, jurisdiction poses centrally important questions to law and jurisprudence but, as a principle in its own right, it has received little attention. Contributing to a small but growing critical literature on jurisdiction this thesis contends that jurisdiction has a unique character that deserves careful theorising.

Taking the common law tradition as its primary site of engagement, the thesis argues that jurisdiction has a dual aspect, functioning to both offer a ground for positive or formal law and reflect an extant set of informal practices. In this sense, jurisdiction operates as a third term for the law, mediating between two lawful registers: the positive law and a “law of originary sociability.” I argue that, though attempting to fix and determine this relation, jurisdiction is marked by ambivalence and instability. This indeterminacy, however, is often overlooked; jurisdiction is presented *as if* it were simply a matter of sovereign force or fiat. Rather than conceive jurisdiction as an expression of the law’s sovereign authority, the thesis argues that jurisdiction is a privileged point at which we can see the law’s fragility. Jurisdiction, then, is a legal technique open to critical intervention and interruption. Such strategies of intervention, that seek to occupy jurisdiction’s function but articulate it otherwise, I name “juriswriting.”

My approach to jurisdiction is developed through the philosophy of Jacques Derrida and Jean-Luc Nancy. Both thinkers understand law to have two distinct, but related, senses. On the one hand, there is the law as positive, determinative and violent, on the other hand, law is presented as inoperative and indeterminative, connected either to the law of *différance* or an ontological assertion of our “being-with” (*Mitsein*). Both Derrida and Nancy reserve a place for “law” that exceeds the positive law and is, in fact, bound to it in a paradoxical double bind, both providing its conditions of possibility and denying its full efficacy. This characterisation of a doubled aspect to law provides the theoretical frame for my understanding of jurisdiction and is traced through my engagements with Kafka; the sixteenth century constructions of the common law; jurisdiction’s performative and declaratory mode; as well as jurisdiction’s role in bringing political community into relation with the law.

The engagement with Derrida and Nancy not only provides the theoretical orientation for this study of jurisdiction but represents a second strand to the argument pursued in the thesis. Moving away from the Levinasian inspired understanding of deconstruction and the law of the 1990s, the thesis seeks to offer a more holistic reading of Derrida's work, drawing on both his later texts with a specifically juridico-political bent, as well as the earlier interventions on writing and speech act theory. Nancy – particularly his ontology of "being-with" and his work on community – provides a useful supplement to Derrida's thinking. As the ethical readings of deconstruction in the 1990s turned to Levinas, I turn to Nancy in order to foreground a political current within Derrida's work. Reading Derrida with Nancy allows me to develop a sense of the political possibilities at stake in reimagining jurisdictional practices and techniques, particularly important for my understanding of juriswriting.

Table of Contents

TITLE PAGE	1
DECLARATION AGAINST PLAGIARISM	2
ABSTRACT	3
TABLE OF CONTENTS	5
ACKNOWLEDGEMENTS	8
PREFACE	10
1 INTRODUCTION: JURISDICTION AND DECONSTRUCTION	
1.1 Introduction	16
1.2 Jurisdiction	17
1.2.1 Territorial jurisdiction	18
1.2.2 Beyond the bright lines	22
1.2.3 Towards a theory of jurisdiction	25
1.3 Deconstruction	32
1.3.1 What is deconstruction?	32
1.3.2 Deconstruction and law	36
1.3.3 Why Jean-Luc Nancy?	42
1.4 Conclusion	44
2 FROM JURISDICTION TO JURIS-FICTION	
2.1 Introduction	46
2.2 Before the Law	47
2.2.1 The jurisdiction of <i>Before the Law</i>	50
2.2.2 The Law before the law	52
2.3 (De)constructions of the Common Law	58
2.3.1 Mythologies of the common law	59
2.3.2 <i>Calvin's Case</i> and the law before the law	64

2.4 Juris-fiction	70
2.5 Conclusion	74
 3 JURISDICTION: PERFORMATIVITY AND RESPONSIBILITY	
3.1 Introduction	76
3.2 The Performative Speech Act and the Declarative Foundation	78
3.2.1 The performative: Derrida reading Austin	80
3.2.2 Declarations to come (à venir)	84
3.2.3 Conjuring the declaration	89
3.3 Conjuring the National Transitional Council for Libya	94
3.4 Responsibility	99
3.4.1 Inheritance and (ir)responsibility	101
3.4.2 Nancy and the leap of political responsibility	104
3.5 Conclusion	108
 4 JURISDICTION (UN)GROUNDING LAW: FRATERNITY, COMMUNITY AND BEING IN COMMON	
4.1 Introduction	110
4.2 Community, Violence, Law	113
4.2.1 Communities of principle	113
4.2.2 Jurisgenerative communities and the jurispathic State	117
4.3 Community as Fraternity	121
4.3.1 The violence of community: singularity and différence	124
4.4 Community as Inoperative	128
4.4.1 In common without community	132
4.5 Community and Autoimmunity: Jurisdiction (Un)grounding Law	135
4.5.1 Democracy as autoimmune	135
4.5.2 Community as autoimmune	139
4.5.3 Jurisdiction (un)grounding law	141
4.6 Conclusion	148
 5 FROM JURISDICTION TO JURISWRITING	
5.1 Introduction	150
5.2 Right-ing	152
5.3 Writing	156
5.3.1 Writing, text, interpretation	160

5.3.2 Writing and the plasticity of closure	166
5.3.3 The staging of writing	168
5.3.4 Writing (as) the law	171
5.4 Towards Juriswriting	173
5.5 Juriswriting in the Squares	176
5.6 Jurisdiction and/or Juriswriting	181
5.8 Conclusion	185
BIBLIOGRAPHY	187

Acknowledgements

There is no thunder bolt of friendship; there is, rather, a little by little, a slow labour of time. We are friends – and we didn't even know it. (Maurice Blanchot)

In one of his later texts, Derrida suggests that friendship is not so much a question of the friend's presence, but their absence. Our friends are never fully present to us, rather, true friendship demands respect of the friend's otherness, their radical singularity that we can never appropriate, make present or claim as our own. Friendship is marked by a certain impossibility and fragility requiring – like love – the continual affirmation and testing of its limits. This thesis is haunted by such absent friends, every page marked by their ghostly presence. I have been so very fortunate to have had the support of so many during the past four years whilst this project was written. To them all I am truly thankful. My thanks extend to SCASST whose postgraduate scholarship supported me in my first year of study and to the Birkbeck Law School whose Continuing Student Studentship assisted in the third. Frances Connolly provided much needed help with the bibliography. My Grandmother, June Gapp, long since passed, bequeathed me both some funds that enabled me to start my doctoral studies and a writing desk at which I sat to pen almost every word found herein.

Enduring and heartfelt thanks to Costas Douzinas who supervised my work. At every stage, of what turned out to be a fairly circuitous route to the final draft, Costas never wanted for encouragement, affirmation and a quiet confidence that things would turn out right in the end. With a staggeringly diverse set of philosophical and theoretical resources on which to draw, as well as insisting on my grappling with the political and ethical responsibility that academic work entails, Costas's guidance, comradeship and support has been invaluable. Many thanks are owed, too, to Stewart Motha. Not only possessing detailed knowledge of Nancy and Derrida but also a shared love of the grape and the grain and all that it has to offer, Stewart has been a great friend and ally, offering sage counsel throughout. Peter Fitzpatrick has been a much valued interlocutor over the last couple of years and, through his reading group – running now for some thirty years – has offered a rigorous, challenging and stimulating forum in which to pick over many of the texts that animate these pages. Peter has maintained a vital space for scholarship and intellectual camaraderie for which I owe sincere thanks.

It has been a great privilege to be part of the community of PhD students and researchers at the Birkbeck Law School, all of whom continue to amaze by their talent, knowledge and application. Tackling sophisticated and important work, this inoperative community of scholars and friends has not only provided some of my fondest memories but has also inspired me to seek greater clarity, to expend more effort and deepen my often all too shallow knowledge. Two friends deserve special mention. Tara Mulqueen provided much needed perspective and thoughtful commentary as drafts of chapters emerged and Roberto Vilchez Yamato, whose pitifully brief eighteen months at Birkbeck left an indelible mark on my thinking. Roberto's appetite for Derrida centred, booze heavy, late night conversation is seemingly limitless. Anastasia Tataryn, Hannah Franzki, Chris Lloyd, Stacey Douglas, David Thomas, Başak Etür, Lisa Wintersteiger, Eddie Bruce-Jones, and Mayur Suresh, as well as recent additions to the Birkbeck troupe, Paddy McDaid and Kojo Koram, all proffered much needed advice and support, intellectual and more besides. A special mention to Hannah whose home fronting Lake Fondi with its extraordinary crepuscular symphony of frogs and cicadas offered a beautiful spot for a week of tinkering at the end. Kanika Sharma and Laura Lammesniemi, my fellow travellers in Greenwich, kept me smiling in all weather.

Away from Birkbeck, too many friends to mention have endured my confusing, and often confused, accounts of what it is that I have been doing for the past four years. Ben, Ben, Ed and Emma deserve special thanks as they, more than others, bore the brunt of my struggles. For their love and friendship I am forever grateful. Robbie – avuncular consigliere – provided good food and familial comforts when needed most. Last, and most importantly, I would like to thank my parents Beryl and Paul. My debt to them, financial and otherwise, falls beyond the realm of the calculable. For always encouraging me to ask questions, for teaching me the value of laughter, wine and poetry, and for letting me make my path by walking, I am thankful beyond words. I did it – and it's down to you.

Preface

For every static world that you or I impose
Upon the real one must crack at times and new
Patterns from new disorders open like a rose
And old assumptions yield to new sensations.
The Stranger in the wings is waiting for his cue,
The fuse is always laid to some annunciation.
(Louis MacNeice)¹

In a letter to Georges Bataille, Maurice Blanchot identifies two registers at work in his writing. The first is dialectical and totalising, the other non-dialectical and fragmentary:

To this double impulse responds a double language, and for all language a double gravity: one is a speech of confrontation, opposition, and negation, meant to reduce any opposition so that the truth as a whole may be affirmed in its silent equality (a path the demand of thought must take). But the other is the speech that speaks before all, and outside of all, speech that is always first, without concord or confrontation, and ready to welcome the unknown, the stranger (where the poetic demand passes). One *names* the possible and wants the possible. The other *responds* to the impossible. Between these two impulses, which are both necessary and incompatible there is a constant tension, often very difficult to bear, and truly, unbearable.²

Blanchot identifies a doubled life to speech, perhaps something with which we are all familiar: on the one hand we want to name things, to capture things in language and preserve their integrity and limits, on the other hand, we know that our speech and our naming always exceeds itself by having the capacity to gesture beyond this determinative register. Something always seems to get lost in our communication; exceeding the register of limitation or closure, the poetic always appears to lurk within the prosaic, the expressive appears to overflow the significative. It would be understandable to think that the law only ever speaks in the first register: the impulse Blanchot describes as totalising and dialectical. The law's desire to name, delimit and contain is well known and its primary technique in so doing is jurisdiction. Jurisdiction (*juris-diction*, the law's speech) is commonly associated with establishing the limits of

¹ Louis MacNeice, "Mutations," *Collected Poems* (London: Faber & Faber, 2002), 195.

² Maurice Blanchot, *Political Writings, 1953-1993*, trans. Zakir Paul (New York: Fordham University Press, 2010), xxxi-xxxii.

legality, marking its territorial and conceptual boundaries thereby naming the possibility of law. Animating this thesis is the question of whether the law might also submit to Blanchot's second impulse and respond in a fragmentary and poetic register to something beyond the merely possible. Might we understand law's speech (jurisdiction) as caught in the unbearable tension that Blanchot describes in relation to his own work? It is the existence, nature and significance of a similar bifurcation at work within jurisdiction that I explore in what follows. In offering an account of jurisdiction, I seek to assess how we might introduce the non-dialectical, poetic and fragmentary into a theoretical account of the law.

Given the central importance of jurisdiction, as a category in its own right it has not received the sort of scrutiny afforded to similarly significant principles for law and legal theory. In contemporary scholarship, justice, sovereignty, punishment, authority and fairness have all been central concerns for theoretically informed accounts of the law. One reason for the relative paucity of theoretical accounts of jurisdiction might rest on the supposition that this principle, on close scrutiny, is really nothing more than one of these more fundamental concepts in other clothes. One might suggest for example that jurisdiction simply enunciates the *sovereignty* of a people or territory, or that jurisdiction relies on, or simply is, the expression of the *authority* of this or that institution. Jurisdiction on such a reading would appear secondary to other categories and concepts. The argument developed here rejects this characterisation. Jurisdiction – conceived as the law's expressive and performative register – has a unique character that cannot be so easily subsumed within some broader notion of sovereignty or authority.

This thesis contributes to a growing, but small, body of literature that has taken up the task of theorising jurisdiction. A theoretical account of jurisdiction is developed here that relies on deconstructive strategies, concepts and texts, particularly the work of Jacques Derrida and Jean-Luc Nancy. By reading jurisdiction through a deconstructive lens, it is argued that the principle can be seen, not only as an instrument in the maintenance of the law's authority but also, constitutive of the law's very fragility. It is here, then, in the processes and practices of jurisdiction that critical interventions within the law might be possible. If jurisdiction expresses the limits and possibilities of legality, the principle represents the possibility of reworking and reimagining legality otherwise. The thesis argues that in addition to the line drawing and determinative impulses usually associated with the term, jurisdiction also engages a register of

sociality that exceeds and interrupts the jurisdictional limit, creating an openness and instability within the law. Moving away from a purely territorial understanding of jurisdiction, I assess this doubled life to jurisdiction in relation to, firstly, the narrative and fictional crafting of the common law; secondly, the performative and declaratory mode of jurisdiction; and, lastly, jurisdiction's relation to community. In each instance a prior register of sociality is explored that exceeds the limit that jurisdiction inscribes. It is through the exploration of this other register to jurisdiction, a mode akin to Blanchot's evocation of the non-dialectical and poetic form of speech above, that I develop "juriswriting" in the final chapter of the project.

Jurisdiction is commonly conceived as a technical and administrative contrivance concerned with the proper operation of judicial authority. Jurisdictional questions, it might be thought, are the exclusive preserve of professional lawyers and forensic technocrats. The technical exigencies of jurisdiction abound and are given ample attention in the existing literature on the conflict of laws and public international law. However, this approach only tells part of the story. This thesis explores the ways in which the expressive dimension to law always exceeds the law's impulse to delimit and determine. Moving jurisdiction away from questions of territorial demarcation and the delineation of juridical authority, this thesis inquires into the possibilities of conceiving of jurisdiction as a means of expressing an inoperative law of social relation. Here I want to briefly outline the argument.

In the first chapter I introduce the theoretical approach that informs the thesis. Assessing both the critical and more orthodox approaches to jurisdiction, I move towards a theory of jurisdiction that will be developed throughout the chapters that follow. In sum, this contends that jurisdiction must be conceived as a process of both grounding and reflection. Following Bradin Cormack I suggest that jurisdiction, beyond inscribing the limits of formal legality, reflects extant but informal practices and social relations. In order to develop this structure to jurisdiction I turn to deconstructive philosophy and strategies of interpretation. Derrida's account of legality in "The Force of Law," in particular, helps undergird the thinking of jurisdiction outlined here. Derrida's doubled account of law as both positive and *différential* helps examine the two registers of law's speech alluded to above.

The turn to deconstruction examined in this introductory chapter also develops a second strand to the argument pursued throughout the thesis. By reading Derrida

together with Nancy, I seek to foreground a political strand to deconstruction, often overlooked in the existing literature on deconstruction and the law. The political aspect to Derrida's thought is developed by drawing Derrida's thinking of *différance* into conversation with Nancy's ontology of "being-with." Throughout the thesis I seek to demonstrate that not only does deconstruction speak to the political (*le politique*) but can also directly inform the realm of politics (*la politique*). By reading Nancy and Derrida together we can see that both posit a bare, but restless, relationality that works as the condition of possibility for politics, but also, specifically through Derrida's understanding of creative practices of writing – examined in detail in chapter five – can inform material political practices and strategies.

By focusing on the artifice and *technê* of jurisdictional practices, the second chapter examines how the structure of jurisdiction outlined above exposes a fragility and contingency within the law. Focusing on the narrative and fictional crafting associated with the common law, the chapter opens with a reading of Derrida's account of the complicity between law and literature in his assessment of Kafka's *Vor dem Gesetz*. This approach, which charts both Kafka and Freud's ultimately failed attempt to offer a transcendental ground for the law, suggests that the law relies on fashioning a narrative and fiction of authority to maintain its efficacy. Derrida's insight regarding the co-appearance of the legal and the literary is put into conversation with the constructions of the common law in the sixteenth and seventeenth centuries, a period of significant consolidation of the laws of England. Addressing both Derrida's identification of a "law before the law" and the ineluctable desire for narrative fashioning within the law, a particular focus is given to *Calvin's Case* (1608) a decision crucial to asserting the limits and authority of the common law jurisdiction. Bringing these reflections into conversation with Nancy's account of "juris-fiction," the chapter concludes by evaluating the shift in register from jurisdiction to juris-fiction. It is argued that by focusing on the work of narrative, fiction and technicity, all deployed to mediate between the positive law and the *différential* law before the law, the contingencies and fragilities of the law are revealed. In this sense, jurisdiction, rather than marking the closure of the law's limits, represents an opening within the law, suggesting that through jurisdiction we might re-imagine the law otherwise.

Chapter three assesses the performative and foundational aspect of jurisdiction. Taking Derrida's reading of J. L. Austin's speech act theory as its point of departure, this chapter reads the declarative moment that seeks to ground the law's authority as itself being

undone by the very movement that makes the declaration possible. I focus on the importance of temporality in Derrida's critique of Austin. By putting Derrida's understanding of the performative into conversation with his broader critique of the metaphysics of presence, his short and provocative intervention on the American Declaration of Independence, as well as notions of "spectrality" and "conjuring" developed in *Spectres of Marx*, I assess how the jurisdictional moment relies on a privileging of presence that effaces the plurality of voices and interests that act as the declaration's condition of possibility. Here we can see a prior, inchoate sociality overflowing jurisdiction's impulse to contain and delimit. I bring this reading of Derrida's engagement with Austin to bear on the declaration made by the National Transitional Council of Libya, the institution that led the anti-Gadhafi resistance in Libya in early 2011. Crucial to Derrida's understanding of the performative is that it calls for a response or counter-signature. Assessing the politics at stake in such counter-signing, I turn to Nancy's response to the Libyan uprising published in *Libération* in 2011. In seeking to account for Nancy's support for Western intervention in Libya, I assess how Derrida's thinking of the performative and the law's declaratory moment, shapes the nature of the responsibility owed in counter-signing this event. The jurisdictional declaration, read through Derrida and Nancy, engages questions of temporality, performativity and community, suggesting that Derrida helps identify the ethico-political stakes in play when an institution, or community declares its presence.

The question of jurisdiction's relation to community is taken up in the fourth chapter through an assessment of Derrida and Nancy's apparently divergent approaches to this notion. The key tasks here are, firstly to understand the effect that jurisdictional practices have on shaping community and, secondly, to examine how Derrida and Nancy's approaches to community open ethico-political possibilities of thinking both jurisdiction and community otherwise. Though apparently contradictory on the status of community, I identify a quiet solidarity between Derrida and Nancy on this question. This is key in developing the politically sensitive reading of deconstruction and the law pursued in the thesis. The chapter proceeds by firstly assessing some of the existing approaches to community and law; secondly I examine the deconstructive accounts of community offered by Nancy and Derrida; and lastly I bring this thinking to bear on *Mabo (No 2)* (1992), a case centrally important to the supposed (re)affirmation of the integrity and independence of both Australia's common law and its political community. Through Derrida, I develop an account of the "autoimmune" community in order to explain the effect that jurisdiction has in bringing community into relation with the law.

Again, the question of political responsibility is significant here, suggesting that the account of an autoimmune community, set in motion by jurisdictional practices, might offer a corrective in assessing the meeting place between different laws and legal traditions.

The final chapter introduces and develops the notion of juriswriting. Drawing on the themes of temporality, political responsibility and a re-imagining of community or “being-with” developed in the thesis thus far, juriswriting describes particular practices of occupying the jurisdictional form in a mode that rejects many of the characteristics usually associated with the principle. This involves privileging the pole that is often overlooked in relation to jurisdiction: the second, poetic and indeterminative register to which Blanchot alludes in the passage above. Juriswriting is developed by putting the notion of right-ing, developed by Douzinas and Wall, into conversation with a deconstructive account of “writing,” broadly understood. Drawing on Nancy, Blanchot and, most heavily, Derrida’s approach to writing, I highlight particular political practices that use the jurisdictional form to express another shade to legality. The concept of juriswriting, developed in the final chapter, is presented alongside an engagement with the various political eruptions, events and uprisings of 2011, particularly the strategy of occupying public space to affirm the need for political change. I suggest that these events pose challenges to the extant account of jurisdiction, arguing that juriswriting comes closer to capturing the tenor and force of these events. With juriswriting I explore the notion that jurisdictional practices not only conform to the work of delimitation and inscription but can be occupied to express the open potential of people being together. The notion of juriswriting seeks to rest the law, and jurisdiction, away from the exclusive preserve of legal experts and technocrats into the more fertile ground of the creativity of people coming together to perform the need for political change. A shift from jurisdiction to juriswriting does not escape the constant and unbearable tension that Blanchot identifies between the demand for delimitation, on the one hand, and the poetic demand, on the other. But by examining how jurisdictional practices exceed themselves in their very inscription, I hope to open new possibilities within the expressive and performative register of legality: the stranger in the wings is waiting for his cue.

Chapter 1

INTRODUCTION: JURISDICTION AND DECONSTRUCTION

The secret history of jurisdictional authority is that it is produced as an ongoing, serial, ad hoc encounter with its own limits (Bradin Cormack).¹

Deconstruction is neither a theory nor a philosophy. It is neither a school nor a method. It is not even a discourse, nor an act, nor a practice. It is what happens, what is happening today in what they call society, politics, diplomacy, economics, historical reality, and so on and so forth (Jacques Derrida).²

1.1 Introduction

The American legal theorist Robert Cover suggests that the only way a judge can try to hide the inherent violence of her office is through an appeal to some jurisdictional text or principle. Such jurisdictional justifications, for Cover, are ‘apologies for the State itself and for its violence’ but, as Cover contends, these more fundamental questions are masked in the appeal to some “jurisdictional authority.”³ There is, then, something shameful about jurisdiction. If we look too closely, we might see behind a façade of peaceful and orderly administration, a violent, and perhaps fantastic, series of events, myths, violations, presumptions and fabrications. Jurisdiction is of central importance to the law: the authority of judicial decisions, the scope and nature of the law’s influence, and the declaration and institutionalisation of normative orders all rest on some jurisdictional claim. In accounting for the law, its practices and its institutions we are bound to say that jurisdiction “goes all the way down,” infecting the very foundations of legality. However, as Cover intimates there is always a movement at work before any assertion of jurisdiction, a movement that an appeal to jurisdictional authority, to some constitutional text or practice,

¹ Bradin Cormack, *A Power to do Justice: Jurisdiction, English Literature and the Rise of the Common Law 1509-1625* (Chicago: Chicago University Press, 2007), 222.

² Jacques Derrida, “Some Statements and Truisms about Neologisms, Newisms, Postisms, Parasitisms, and Other Small Seismisms,” in *The States of “Theory”: History, Art, and Critical Discourse*, ed. D. Carroll, (New York: Columbia University Press, 1990), 85.

³ Robert Cover, “The Supreme Court, 1982 Term – Foreword: *Nomos* and Narrative,” *Harvard Law Review* 97(4) (1983), 54.

seeks to do without. By bringing some of the existing literature on jurisdiction into conversation with deconstructive philosophy and strategies of interpretation, in this chapter I aim to begin to examine the nature of this prior movement at work before the positing or reliance on some jurisdictional text or principle. The chapter proceeds by first examining some of the existing approaches to jurisdiction before suggesting how deconstruction intervenes in this literature and helps supplement the existing critical scholarship in this area.

1.2 Jurisdiction

Though not without controversy, it is often argued that the history of modernity has progressed hand-in-hand with an increasing centralisation of power at the expense of provincial interests and practices.⁴ The modern nation State is, perhaps, the most obvious product of this work of centralisation, achieved through a variety of governmental techniques aimed at first creating and then administering authority in a determined territory. As Richard T. Ford has argued, the creation of the modern territorially integral State depends on the techniques and practices of jurisdiction.⁵ In the classical account, jurisdiction is tied to the territorial integrity of a particular nation. The connection between territory and jurisdiction is so firmly embedded in the legal and political psyche that some find it difficult to think of jurisdiction as being anything but tied to a territorially determined legal order.⁶ Jurisdiction is often thought to be exclusively a matter of territorial delimitation and control. The authority of supra-national organisations such as the United Nations and European Union; wars conducted on the basis of “global influence” rather than (sovereign) territorial appropriation; the assassination of suspected criminals on sovereign territory; and the fact of universal jurisdiction for international courts all point to certain threats to the traditional notion of the sovereign nation State as well as the territorial jurisdiction that purports to guarantee its legal authority. The postmodern weakening of the

⁴ Richard T. Ford, “Law’s Territory (A History of Jurisdiction),” *Michigan Law Review* 97 (1998-1999), 889 and 909.

⁵ Ford, “Law’s Territory,” 866-897. Ford highlights a number of jurisdictional devices that facilitated the creation of the nation state. He is particularly interested in the effect of two coincidental innovations: the emergence of the science of cartography and the political development of liberal, humanist governance. See in particular 867-880.

⁶ In his study of jurisdiction in international law, Cedric Ryngaert excludes a discussion of extra-territorial jurisdiction from his analysis because of the term’s ‘connotations with illegitimacy and outrageousness’ see, Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008), 7-8.

nation State has given rise to a myriad of jurisdictions and jurisdictional orderings. Jurisdictions today increasingly imbricate and tussle for position against a backdrop of global or universal jurisdiction.⁷ As McVeigh and Dorsett suggest, ‘we will have lived in a world of jurisdiction’,⁸ a world which is increasingly shaped and given voice through the various techniques and practices of jurisdiction. In the sections that follow I want to assess some of the ways the phenomena of jurisdiction might be understood. In assessing both the traditional territorial understanding of the concept as well as more critical and creative approaches, I develop an understanding of jurisdiction that will work as a touchstone throughout the thesis.

1.2.1 Territorial Jurisdiction

Notwithstanding increasing challenges to the sovereignty of the nation State noted above, a connection between territory and jurisdiction, at first blush, appears natural and uncontroversial. We know that when we cross a national border, we will be governed by different laws and owe a different set of legal obligations as a result. We know too that when we enter territorially defined spaces such as a mosque, the site of a music festival or the changing rooms at the gym, specific social obligations arise. As we move from one space or territory to another we expect to be governed by different (legal) norms and have different social and cultural expectations. Territory appears to be inextricably bound up with the imposition of normative organisation: “territory” (a portmanteau of *terra*, “land” or “earth” and *torium*, “belonging to or surrounding”) originally referred to the land outside a city over which that city had jurisdictional control.⁹

Modern examples of the seemingly unquestionable connection between land or space and legal authority are multifarious. One particularly powerful source for underscoring this relation is the American Western genre. Set against the backdrop of contestations between state and federal control of the United States in the latter half of the 19th century, Westerns are often searching meditations on the realities of territorially delimited jurisdiction. Think of the town sheriff who refuses to pursue an outlaw who escapes to a neighbouring

⁷ See Costas Douzinas, “The Metaphysics of Jurisdiction” in *Jurisprudence of Jurisdiction*, 7.

⁸ Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012), 1.

⁹ Dorsett and McVeigh, *Jurisdiction*, 39. As indicated by the Oxford English Dictionary, the etymology for territory is unsettled. An alternative derivation can be found through *terrere*, “to frighten” and thus territory would name a place from which one is warned off. In either case, territory is clear associated with a capacity to control and exercise authority.

jurisdiction, or the persistent evocation of “bandit country” where it is the outlaw who has *de facto* jurisdictional control. Here the frontier myth of the American West is tied directly to a sense of place and space: jurisdiction is a matter of declaring control and then actually controlling – usually by excluding inconveniences like current inhabitants – a determined geographical area.¹⁰ All this seems uncontroversial. But as Ford points out, ‘rigidly mapped territories within which formally defined legal powers are exercised by formally organised governmental institutions... are relatively new and intuitively surprising technological developments’.¹¹ Notwithstanding its relatively recent emergence, jurisdiction’s function in delimiting territory remains an essential aspect of the principle and cartography a key technique in determining the reach and integrity of political communities.¹² However, thinking of jurisdiction as a being *exclusively* a matter of delimiting and defining territory creates an overly simplistic understanding of jurisdictional effects and techniques. However, it is worth briefly noting the form that a territorial understanding of jurisdiction takes.

Following Ford’s “prototypical” definition of territorial jurisdiction¹³ we might make the following observations. Territorial jurisdiction conceives jurisdiction abstractly and impersonally, jurisdiction does not attend to actual practices or relations between people and things, rather jurisdiction is conceived independently from any particular attributes of a jurisdictional space. Jurisdiction maps a homogeneous and conceptually empty space, in which certain practices and relations may occur. An important corollary to this view is that jurisdiction is conceived as being definitely bounded: jurisdictions *delimit* legal space creating a contiguous network of areas each attaching to a particular normative system. This, perhaps, is the *sine qua non* of a territorial conception of jurisdiction: it establishes and

¹⁰ For an examination of some of the jurisdictional implications of the Western genre see Bill Grantham, “Embracing Jurisdiction: John Ford’s *The Man Who Shot Liberty*” in Shaun McVeigh ed., *Jurisprudence of Jurisdiction* (Abingdon: Routledge, 2007), 225-237. For a contemporary example of the relevance of jurisdiction to the Western genre see Joel and Ethan Coen’s *True Grit* (Paramount Pictures, 2010) where a bounty hunter (possessing what he seems to think is a quasi-universal jurisdiction) and a Texas ranger (possessing cross-border jurisdictional authority) compete to capture a fugitive criminal.

¹¹ Ford, “Law’s Territory,” 843.

¹² As noted above Ford argues that the developments in modern cartography were crucial for the territorial definition of jurisdiction, see Ford, “Law’s Territory,” *passim* but especially, 852-855 and 868-875. Following Ford’s argument, Shaunnagh Dorsett argues that the technique of mapping is central to the question of common law jurisdiction especially in relation to how the common law in Australia has constructed native title. See Shaunnagh Dorsett, “Mapping Territories” in McVeigh ed., *Jurisprudence of Jurisdiction*, 137-157.

¹³ Ford “Law’s Territory,” 852-855.

maintains identifiable and rigid lines of demarcation between the inside and outside of a zone of legal authority. As Ford suggests territorial jurisdiction posits legal boundaries as inflexible ‘bright lines’¹⁴ that cannot be displaced or manipulated.

For Carl Schmitt, the ability to delimit the earth and mark out a territory through enclosures, boundaries and visible divisions is of fundamental importance to understanding the conditions of possibility for the law.¹⁵ Schmitt follows both Kant and Locke in asserting land appropriation and the possibility of territorial demarcation as the primary juridical acts.¹⁶ This possibility of delimiting the earth is in radical contrast to the freedom of the sea where ‘firm lines cannot be engraved’¹⁷ and, consequently, no jurisdictional limit is possible. Such a territorially determined conception of jurisdictional ordering permeates much legal thinking and relies on the positing of strict binaries: law/non-law; common law/equity; criminal law/civil law; law/fact and so on. In fact, the conception of the law as being intrinsically territorial and capable of maintaining itself in contradistinction to its others is the mainstay of the positivism that dominated jurisprudence in the twentieth century. H.L.A Hart’s *Concept of Law* and Kelsen’s *Pure Theory of Law* both argue for the existence, and maintenance, of a strict delimitation between law and non-law, suggesting that law will only have a contingent relationship with ethical or moral maxims.¹⁸ Law, so conceived, is conceptually integral. The territorial inference in the positivists’ conceptual understanding perpetuates a view of jurisdiction being a matter of *policing* the legal limit. A border is erected that separates “us” within a jurisdiction from “them” outside it; “us” scholars of “law” properly defined and understood and “them” scholars who confuse law with society, morality and other value systems. In this sense, the paradigm of territorial jurisdiction shapes how we conceive of law more generally. The territorial notion of jurisdiction is reflected in a positivist conception of law predicated on a hierarchy of binary terms.

¹⁴ Ibid., 853

¹⁵ Carl Schmitt, *The Nomos of the Earth: In the International Law of the Jus Publicum Europaeum* (New York: Telos Press Publishing, 2006), 42-49 and 172-175.

¹⁶ Kant suggests that proprietorship of the soil is the condition of possibility for all ownership and all further law, whether public or private. Locke claims that government has ‘a direct jurisdiction only over the land’. See Schmitt, *The Nomos of the Earth*, 46-47.

¹⁷ Schmitt, *The Nomos of the Earth*, 42.

¹⁸ H.L.A Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997), 155-212, *et passim*; also on Hart’s positivism see, “Positivism and the Separation of Laws and Morals” *Harvard Law Review* 71 (1958), 593; Hans Kelsen, *The Pure Theory of Law* (Berkeley: University of California Press, 1967). For an account of how deconstruction undoes much of positivism’s claims see, Margaret Davies, *Delimiting the Law: Postmodernism and the Politics of the Law* (London: Pluto Press, 1996).

Another, and perhaps clearer, example of the how a jurisdictional logic, reliant on strict delimitation and delimitation, shapes accounts of law comes from systems theory. Niklas Luhmann's attempt to account for the complexities of modern society posits a primary binary at the root of all social systems.¹⁹ Each system comes to presence through some fundamental differentiation that works as an orientating point for each system's language or code. The legal system encodes the world into legal/illegal; the economic system into profit/loss; the medical system into healthy/unhealthy and so on. In Luhman's account, one event or set of circumstances will be dealt with by each system according to its own code by translating the event or circumstances into the language that operates in one particular system. This means that systems only speak to themselves in the their own language by referring back to their primary binary or differentiation.

Jurisdictional practices, then, might be conceived as those that maintain such binaries, policing the limits of the law. In what follows I make the case for thinking beyond this conception of jurisdiction by developing a theoretical account that moves away from the elision between jurisdiction and territory. This allows us to assess the conditions of possibility of the jurisdictional limit. Furthermore, asserting that the connection between territory and jurisdiction is natural or uncontroversial ignores the significance of the alternative functions that jurisdiction fulfils, both historically and contemporaneously. Taking my cue from Ford's assertion of the relatively novel association of jurisdiction with territory I want to discuss accounts of jurisdiction that question the "bright lines" theory associated with territorial jurisdiction. To be clear, I do not suggest that territorial jurisdiction is without import or interest – given its ongoing political and legal significance this would be foolish in the extreme.²⁰ However, my endeavour here is to suggest that to think of jurisdiction as *exclusively* a matter of territorial demarcation and delimitation misses the richness of the concept for a theoretical reflection on the law. It limits our conceptual framework and ushers us towards a simplistic understanding of both how law (in general) and jurisdiction (in particular) operates. The politics of border disputes and the intricacies of conflict of laws analysis only tells part of the story of jurisdiction. My

¹⁹ See Niklas Luhmann, "Law as a Social System" *Northwestern University Law Review* 83 (1989), 136-150.

²⁰ For a thorough assessment of the notion of territory, its relation to terrain and territoriality and its significance for political and legal thinking see Stuart Elden, *The Birth of Territory* (Chicago and London: University of Chicago Press, 2013), 1-19, *et passim*.

contention is that more fundamental jurisprudential questions are at stake in this concept, an attention to which reveals something of the logic that both animates and threatens the law from within. Of central importance to what follows is an attentiveness to *what comes before* the inscription of a jurisdictional line that determines the limits of a territory or legal system. I contend, following certain deconstructive insights and anxieties, that there is always a movement that precedes the assertion of the legal/illegal binary or the border that delineates the form of contiguous legal zones. It is this prior movement that needs to be brought to the fore. To start with, however, let's turn to some accounts of jurisdiction that think beyond the bright lines associated with the territorial approach.

1.2.2 Beyond the Bright Lines

In his *History of the Common Law of England* Sir Matthew Hale suggests that the common law's diverse denominations and jurisdictions, from the 'Province [or] Shire [to the] Island [or] Country... are but parts of the same Ocean'.²¹ The development of the common law shares modernity's appetite for centralisation. Hale's claim that the common law subsumes all diversity and difference into a single "legal ocean" is crucial to understanding how common law jurisdiction is conceived. If today we live in a time of proliferating jurisdictions then, as Peter Goodrich points out, then 'the premodern is postmodern [and] the medieval is contemporary'.²² The history of the common law charts a sustained effort to subsume and silence a plurality of legal discourses that lay at its foundations. The difficulty of thinking of jurisdiction as anything other than territorial is perhaps part and parcel of this very strategy of subsumption. As Shaunnagh Dorsett points out:

Until the 18th century... jurisdiction was predominantly organised by subject-matter or personal status: ecclesiastical courts determined matters relating to church law, manorial courts applied the body of customary law known as manorial law, courts of stannary decided

²¹ Sir Matthew Hale, *The History of the Common law of England* [1713] (Charles Grey ed. 1971), quoted in Shaunnagh Dorsett, "Since Time Immemorial: A Story of Common law Jurisdiction, Native Title and the Case of Tanistry" *Melbourne University Law Review* 26 (2002), 32. The reference to a legal "ocean" to which all subsidiary jurisdictions are part is noteworthy given Schmitt's assertion that the sea is incapable of delimitation and therefore fundamentally lawless. Hale's reference to the "ocean" emphasises an illimitable sense of law that exceeds any jurisdictional delimitation. This positing of an illimitable substrate of (common) law was central the early Common law's subsequent dominance of the legal landscape of England.

²² Peter Goodrich, "Visive Powers: Colours, Trees and Genres of Jurisdiction," *Law and Humanities* 2 (2008), 227.

issues relating to tin mining operations, and forestry courts oversaw the... law of the forest'.²³

In every case, the question of jurisdiction (that is, the question of which law or which court has the authority to hear a case) is not determined by one's presence in a particular geographical spot but by the profession one leads, the status one has acquired or inherited, or the particular activity one has carried out. While certain anomalies remain,²⁴ the common law has worked to either jettison these jurisdictions all together or subsume them into a unified whole so they become different branches of a single tree.

As Peter Goodrich has argued, a key strategy in fostering a critical approach to the law relies on an attentiveness to the "minor jurisprudences" of those jurisdictions that 'escape the phantom of a sovereign and unitary law'.²⁵ Goodrich uncovers the historical residues of a time when jurisdictions were multiple and diverse in an effort to challenge and displace a sovereign, masculine and calculating conception of the legal order.²⁶ Critical legal studies on this reading seeks to recover the law's conscience by examining its discarded jurisdictions: the "Courts of Love" in medieval France, the "courts of conscience" of the Ecclesiastical tradition and the implicit "jurisprudence" of literature and aesthetics in the history of the common law. The historical orientation of Goodrich's studies, however, in no way suggest that these meta-territorial jurisdictional techniques and effects remain anachronistic. In a recent critical introduction to jurisdiction, Shaunnagh Dorsett and Shaun McVeigh note the various forms that jurisdiction takes and the variety of (legal) techniques that are deployed in its founding and maintenance. Throughout their work, Dorsett and McVeigh are concerned with the ways in which jurisdiction creates lawful relations. "Lawfulness" concerns the practice of living with the law and questions of lawful relations inquire into

²³ Shaunnagh Dorsett, "'Since Time Immemorial': A Story of Common law Jurisdiction, Native Title and the Case of Tanistry" *Melbourne University Law Review* 26 (2002), 34.

²⁴ Until the *Judicature Acts* of the late 19th century, Equity (administered by the Court of Chancery) remained the most prominent jurisdiction other than the common law in England and Wales. Though a certain jurisdictional differentiation remains between equitable and common law doctrines, both bodies of the law are now administered in common law courts and by common law judges. However, alternative jurisdictions do remain. For example, even today Ecclesiastical Law remains a distinct jurisdiction alongside the common law in England and Wales, though with limited powers extending only to church buildings, certain offences by priests in relation to doctrine, ritual etcetera. See Dorsett and McVeigh, *Jurisdiction*, 44-45.

²⁵ Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996), 2

²⁶ See in particular, Goodrich, *Law in the Courts of Love*, 1-8 and more generally see Goodrich, Yifat and Douzinas eds. *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (London: Routledge, 1994).

how social, ethical and political relations are shaped by and through the law.²⁷ Crucial to Dorsett and McVeigh's approach to jurisdiction is an emphasis on how the various techniques of jurisdiction – from mapping and cartography to the doctrine of precedent, from writing and legal dissemination to the classification of legal concepts like “tort” or “property” – all work to shape lawful relations and are thus instrumental in producing and maintaining a certain sense of legal subjectivity. Their work illustrates that the techniques of cartography associated with territorial jurisdiction are but part of a much broader and diverse set of technologies of jurisdiction.

Dorsett and McVeigh's approach to jurisdiction sits alongside a number of recent publications that interrupt the simple elision between jurisdiction and territory.²⁸ All suggest – with a variety of particular concerns – that jurisdiction has been for too long an overlooked category in jurisprudential thinking. Rather than dwell on technical exigencies, this literature conceives jurisdiction broadly as a set of practices and techniques that give voice to legal authority. Juris-diction (*ius-dicere*), after all, is “law’s speech” the oral and performative register of normativity. Following this literature, jurisdiction should be thought as the expressive register of the law and might include judgment; declarations of law or independence; procedural matters and ordering; or techniques that represent legal space such as mapping and cartography. Questions concerning a court’s competencies or the intricacies of conflict of laws analysis are given minimal attention. More fundamental issues are at stake. Jurisdiction is considered the first question of law and a privileged term in any theoretical account of normative systems and structures. Much of the literature, in fact, goes further than this, suggesting that by attending to jurisdictional techniques and practices a series of jurisprudential questions emerge that, rather than pursue a purely ontological inquiry into legal categories, assess how the law crafts and manipulates legal

²⁷ Dorsett and McVeigh, *Jurisdiction*, 1-9.

²⁸ See in particular, Edward Mussawir, *Jurisdiction in Deleuze: The Expression and Representation of Law* (Abingdon: Routledge, 2011); Shaunnagh Dorsett and Shaun McVeigh *Jurisdiction* (Abingdon: Routledge, 2012); Bradin Cormack, *A Power to do Justice: Jurisdiction, English Literature and the Rise of the Common Law 1509-1625* (Chicago: Chicago University Press, 2007); and *Jurisprudence of Jurisdiction*, S. McVeigh ed. (Abingdon: Routledge, 2007). These contributions, it should be noted, owe much to the work of Peter Goodrich and Pierre Legendre, most notably: P. Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996) and P. Legendre, “The Judge Amongst the Interpreters: Psychoanalysis and Legal Judgment” in *Law and the Unconscious: A Legendre Reader*, trans. P. Goodrich, A. Pottage and A. Schütz (New York: St Martin’s Press, 1997), 164-210.

personalities and concepts through artifice or technicity. In the following section I engage with some of this literature in an effort to move towards a theory of jurisdiction.

1.2.3 Towards a Theory of Jurisdiction

It is notable that neither Foucault, Agamben nor Derrida – mainstays for contemporary legal thought on matters of sovereignty, power and authority – offers any sustained assessments of jurisdiction. This reluctance to deal with jurisdiction as a category in its own right, perhaps, signals a wider propensity to either elide jurisdiction with sovereignty, suggesting that jurisdiction simply describes the maintenance of sovereign control of a territory, or avoid the matter altogether, leaving jurisdiction in the hands of technicians and doctrinal scholars.²⁹ However, jurisdiction – which, in its barest formulation, names the authority to, and the effect of, speaking (in the name of) the law – goes to the heart of the most important jurisprudential questions. An inquiry into jurisdiction might attune our ears to the multifarious ways in which the law controls its speech.

In describing the English legal system to his host and master in the Country of the Houyhnhnms, Lemuel Gulliver offers the following example of jurisdictional control in action:

If my Neighbour hath a mind to my Cow, he hires a Lawyer to prove that he ought to have my Cow from me. I must then hire another to defend my Right; *it being against all Rules of Law that any Man should be allowed to speak for himself.*³⁰

The law maintains a monopoly over its own speech, it guards this power carefully because it is a crucial means of the law's self-preservation. As Patrick Hanafin has suggested, the law's 'reductive violence' is achieved through its ability to ventriloquise on behalf of those that come before it.³¹ In an assessment of Maurice Blanchot's trial following his involvement in the movement against the French war in Algeria, Hanafin provides a striking example of one of many jurisdictional techniques used to install authority in the name of the law. As procedure dictates in many civil jurisdictions, a magistrate takes a deposition from the accused and then renders this in the magistrate's own words for the court record. During

²⁹ Cormack suggests that this reluctance stems from the fact that the jurisdiction is viewed as being 'already inside the discourse and technology that critical genealogy means to counter' (Cormack, *A Power to Do Justice*, 7).

³⁰ Jonathan Swift, *Gulliver's Travels* (Oxford: Oxford University Press, 2005), 231, my emphasis.

³¹ Patrick Hanafin, "The Writer's Refusal and the Law's Malady" *Journal of Law and Society* 31(1) (2004), 6.

his hearing, Blanchot refused to allow this recapitulation to take place. As Blanchot queries, ‘why is it that the judge has the right to be the sole master of language, dictating (in what is already a *diktat*) the words of another, as seem appropriate to him’?³² Blanchot’s refusal to have his speech controlled by the law manifests as a direct challenge to the court’s authority; he challenges what Swift intimates is the law’s univocal nature. Blanchot both exposes and attacks the expressive limits of the law. The law maintains itself through the denial of the other’s speech, *who* speaks and *how* they speak in relation to the law – the magistrate warns Blanchot, ‘there are things that you do not say here’³³ – is crucial to the crafting of law’s authority. In understanding how these questions of lawful speech shape the law and lawful relations, three recent studies of jurisdiction deserve particular attention. A brief assessment of their approaches allows us to situate the present contribution in the existing literature.

The first is Shaun McVeigh’s edited collection *Jurisprudence of Jurisdiction*. This project is primarily concerned to turn the attention of critical jurisprudence to the category of jurisdiction. Assessing philosophical, political and technological aspects to jurisdiction, the collected essays deploy a variety of theoretical strategies to develop a jurisprudential reading of jurisdiction. As the introduction to the project – along with McVeigh’s later work with Shaunnagh Dorsett – makes clear, McVeigh is particularly interested in the way that jurisdictional practices and orderings shape the conduct of those who appear before the law. Jurisdiction, for McVeigh, is not only a matter of pronouncing that there is law or giving effect to certain legally sanctioned orders, jurisdiction is the legal device *par excellence* that shapes our decorum and comportment before the law, as both the Swift quotation and Hanafin’s assessment of Blanchot’s courtroom antics makes clear. McVeigh suggests that the project is ‘not so much a critique of the form of law, but an investigation of the modes or manners of coming into law and of being with law’.³⁴ In this sense, jurisdiction is thought as a practice that shapes our responsibility, as well as the nature of our ethical responses, to the law. We should read McVeigh’s focus on the “ethical” as having the dual sense of both a

³² Maurice Blanchot, “Pre-texte: Pour L’Amite” in *A la Recherche d’un communisme de Pensée*, ed. D Mascolo (1993) quoted in Patrick Hanafin, “The Writer’s Refusal and the Law’s Malady” *Journal of Law and Society* 31(1) (2004), 5.

³³ Patrick Hanafin, “The Writer’s Refusal and the Law’s Malady” *Journal of Law and Society* 31(1) (2004), 5.

³⁴ McVeigh ed, *Jurisprudence of Jurisdiction*, ix. On the question of jurisdiction and responsibility and conduct see also, S. Dorsett and S. McVeigh “Conduct of Laws: Native Title, Responsibility and Some Limits of Jurisdictional Thinking,” *Melbourne Law Review* 36(2) (2012), 470.

set of moral maxims concerning the law's conduct and an *ethos* or "dwelling with" the law. The law, in this account, is an intrinsic part of social life not simply and instrument for administrative control. Acknowledging the power that jurisdiction has beyond the shaping of territorial borders, McVeigh presents jurisdiction as a craft that produces certain relations, responsibilities and allegiances to the law. Underlying McVeigh's work is a marked sense of responsibility to and for the law, particularly pointed in his evocation of the "office" of the jurispudent and jurist.³⁵ For McVeigh, that we have a relation to law is a given: we are lawful beings, always already shaped by and shaping lawful relations. The concern that drives his work, then, is an acute sense of the responsibility to which anyone engaged in legal scholarship and practice must answer. Though conducted in a different register, this thesis follows McVeigh's ethico-political orientation to the study of jurisdiction. The question of ethico-political responsibility is specifically tackled in chapter three but the thesis more generally is marked by a deep sense of responsibility to and for the law, aspiring to what Derrida calls a "lesser violence" of the law. As will become clear, the project too follows McVeigh's understanding of the primary role of a certain *nomos* or "lawfulness" to human relations.

Second is Edward Mussawir's study *Jurisdiction in Deleuze: The Expression and Representation of Law*. Whilst the Deleuzian bent to his study is of limited interest to the present project, Mussawir's insistence on the expressive dimension to jurisdiction is noteworthy. Key to Mussawir's project is the Deleuzian distinction between "representation" and "expression." Put simply, Deleuze (following Nietzsche) suggests that philosophy has unduly focused the question of "what is x?" that inquires exclusively into matters of representation. Displacing this privileged form, Deleuze asks questions of "who?" and "how?" focusing instead on matters of expression. Mussawir argues that an examination of jurisdiction likewise privileges techniques, practices and effects (i.e. matters of expression) rather than abstract or essentialist notions (i.e. matters of representation).³⁶ This orientation is helpful for at least two reasons. Firstly, by emphasising the law's expressive dimension, Mussawir opens an inquiry into jurisdiction to a plurality of theoretical traditions and concerns from the performative to the narrational, the aesthetic to the political. The pressing question becomes *how does law express itself?* or *how does*

³⁵ Shaun McVeigh, "Law as (More or Less) Itself: On Some Not Very Reflective Elements of Law" *Irvine Law Review* (forthcoming, 2014) and S. Dorsett and S. McVeigh, *Jurisdiction*, 139-141.

³⁶ Mussawir, *Jurisdiction in Deleuze*, 8-10; 21-23 *et passim*.

jurisdiction express lawfulness? Rather than *what is law?* or *what is jurisdiction?* Secondly, this focus on the expressive register encourages a technological as well as an ontological inquiry into jurisdiction. In addition to offering a theory of jurisdiction, Mussawir reminds us that jurisdiction names a variety of practices, techniques and encounters.

Last is Bradin Cormack's *A Power to Do Justice: Jurisdiction, English Literature and the Rise of the Common Law 1509-1625*. Cormack's expansive study privileges jurisdiction as a cipher by which the ideological and literary preoccupations during England's early-modern consolidation of the common law might be understood. The project is predominantly an historical study that offers close readings of both literary and legal texts to examine the relation between power and sovereignty. Key to Cormack's intervention is a desire to articulate a deep sympathy between law and literature. Particularly, he assesses the ways in which jurisdictional orderings and practices reveal the law's improvisational and creative streak, as well as underlining the provisional nature of any claim to mark the legal limit. This insight is refracted through a variety of literary texts that question the nature of both political and literary authority and authorship. As Cormack puts it, he seeks to 'reveal the jurisdictional limit at law as a place where legal doctrine is sufficiently destabilized [*sic*] to allow us to see the two discourses, law and literature, as pertaining to a single order and practice of imaginative thought'.³⁷ Cormack's project engages literary, legal, cultural and historical analysis and is worth serious consideration in all of these fields. However, the central insight of the book is of key importance to the concerns of the present thesis. By assessing the deep connection between the creative practice of literature with the (creative) practice of law, Cormack underscores not only a contingency to the law's limit but also the creative potential within the form of jurisdiction itself. This theme is explored most thoroughly in relation to juriswriting in the final chapter.

Cormack's work provides a second important contribution to the theoretical commitments of the thesis. Recall both Blanchot and Swift's assessment of the law's self-reflexive logic: the law denies the other's speech, ensuring that the law only speaks to itself. In this sense, jurisdiction is a performative technique of the law's self-preservation, a comforting voice that reflects the law's sovereign authority back to itself. In perhaps the most convincing elaboration of this jurisdictional logic, Cormack draws on the work of medieval historian

³⁷ Cormack, *A Power to Do Justice*, 39.

Pietro Costa to illustrate how jurisdiction works to create juridical power.³⁸ Costa describes jurisdiction as the process by which an informal given normative architecture becomes formalised. Jurisdiction is a technique of mirroring which both functions to create law as a formal system of rights and reflect a pre-existing, but as yet, informal system of normativity or equity. Jurisdiction is both the creation of a juridical *ground* and the reflection of a juridical *given*. As Cormack puts it:

Jurisdiction is the principle, integral to the structure of the law, through which the law, as an expression of its order and limits, projects an authority that, whatever its origin, needs functionally no other ground. At the jurisdictional threshold, the law speaks to itself, and in a mirror *reproduces* as administration the juridical order that it simultaneously *produces*.³⁹

Jurisdiction's efficacy, on this reading, depends on a constitutive undecidability between a creative process that fashions formal legality and the reproduction or reflection of extant informal practices.

The etymology helps on this point. Jurisdiction is the speaking of *ius* not *lex*. *Ius* refers precisely to a kind of unwritten normative structure. As Peter Goodrich suggests, *ius* has the virtue of having already been said, a law already known and established and implies an archaeological layer of communal knowledge and understanding.⁴⁰ *Ius* is also closely connected to the sense of "law" as a body of norms or a legal system as a whole, rather than specific substantive laws contained in statute and so evokes law in the general rather than the particular.⁴¹ *Ius* refers to a kind of informal, customary normative architecture that is

³⁸ See Pietro Costa, *Jurisdiction: Semantica del Potere Politico nel Pubblicistica Medievale (1100-1433)* (Milan: Giuffrè, 2002).

³⁹ Cormack, *A Power to Do Justice*, 9. It is worth noting here that Cormack positions his theoretical approach against the thinking – most commonly associated with Giorgio Agamben – that posits a trenchant connection between law and sovereignty. Cormack suggests that it is the work of jurisdiction (conforming to the logic noted above) that works to enfold the zone of indistinction into the juridical order and allow it to appear as sovereign. In this sense, Cormack suggests that it is precisely within law that we can find something of the dynamism and political ebullience that Agamben situates only in "life" beyond law. Key too is the way in which jurisdiction displaces a strong sense of sovereignty suggesting that sovereignty is itself less stable than even Agamben's sophisticated account credits. See Cormack, *A Power to Do Justice*, 5-10. On Agamben's "zone of indistinction" and the logic of sovereignty see, Giorgio Agamben, *State of Exception* (Chicago: Chicago University Press, 2008), 1-31.

⁴⁰ Peter Goodrich, "Visive powers: Colours, Trees and Genres of Jurisdiction," *Law and Humanities* 2 (2008), 218.

⁴¹ Alain Supoît, *Homo Juridicus: On the Anthropological Function of Law*, trans. Saskia Brown (London: Verso, 2007), 41.

commonly known and understood by a particular community or collective.⁴² *Lex*, on the other hand, is generally considered to have its root in *legere*, “to read” and so is associated with written and substantive law.⁴³ *Lex* is tied to power over a particular community, enacted and written either by the community itself or by some higher metaphysical authority. The force of *ius* being spoken or declared is to transform *ius* into formal, positive law. The speaking of the law, the announcement of jurisdiction, makes present the legal limit and makes the unwritten informal “normative” conditions of possibility visible and “readable”. Jurisdiction, then, straddles *lex* and *ius*, jurisdiction declares law – that is, fixes law and makes it readable – but jurisdiction also names the discovery or revelation of an extant category or register of legality. Jean-Luc Nancy is particularly helpful on this point suggesting that in *dicere* (the *diction* of jurisdiction) there is not only the inference of “saying” but also of “showing,” “fixing” or “determining.” Nancy suggests, then, that *dicere* is itself constitutively juridical: fixing and determining are all necessary aspects of legal judgment.⁴⁴ There is then an indeterminacy in relation to jurisdiction, following its etymology we can characterise it as appearing between two lawful registers, both grounding and reflecting law.

In highlighting the care taken by the law to guard its own speech, Blanchot takes us to the very heart of this jurisdictional logic. His refusal to allow the magistrate to speak for him is so subversive because it interrupts the economy that maintains the law’s authority. It is the productive relation between the performative self-grounding announcement of the law and the given conditions of possibility for formal juridical activity that guarantees the law’s authority. Such a privileging of jurisdiction ‘helps counter the almost irresistible tendency to make sovereignty have meaning only as political theology’⁴⁵ by moving the conversation

⁴² For a thorough discussion of *ius*, particularly in early Roman law, see Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh: Edinburgh University Press, 1966), 3-25. As Stein makes clear *ius* is generally considered to be unwritten and tied to a community’s shared but largely informal sense of normativity. *Ius* names both this communal law itself and its proper discovery or revelation. Importantly, *ius* is considered to not be created but found. *Ius*, in Roman law at least, is a-temporal and unchanging, connected to the divine or natural order of things.

⁴³ As Stein observes, there are three possible derivations of *lex*: (i) from *ligare* meaning “that which binds or ties;” (ii) from *lagh* meaning “that which lies;” or from *legere*, “to read out or declare.” Stein favours the latter definition and as noted above, the notion that jurisdiction fixes or determines *ius* suggests that jurisdiction has an undecidable relation between *lex* and *ius*: jurisdiction seeks to reflect law qua *ius* and fix law qua *lex*. See Stein, *Regulae Iuris*, 9.

⁴⁴ Jean-Luc Nancy, “Lapsus Judicii” in *A Finite Thinking*, ed Simon Sparks (Stanford: Stanford University Press, 2003), 154.

⁴⁵ Cormack, *A Power to Do Justice*, 9.

away from an inquiry into origins towards an assessment of the practices that relate the juridical *ground* to the juridical *given*. As Blanchot's courtroom intervention reminds us, this juridical given is always open to contestation and political dispute. The claim to ground law in a jurisdictional act or technique (such as marshalling the speech of those in the courtroom) is radically contingent: it is the positive law itself that determines the particular set of juridical preconditions to which it chooses to give voice.

Like Janus – the Roman god of beginnings, transitions and thresholds – jurisdiction is two-faced. It names, on the one hand, a sovereign declaration that law is law, proclaiming the legal limit, fixing, cutting and dividing law from non-law. On the other hand, it names a process of reflecting an extant underlying but informal “legal” reality.⁴⁶ There is, then, an openness within jurisdiction, its declaration of law is not simply a sovereign fiat or official order but engages a prior category of *ius*. It is here that we can see a more sophisticated understanding of jurisdiction than the territorial or “bright line theory” credits. Jurisdiction's very function is seen to engage and reflect an existing informal architecture of relations. This, in turn, implies that, through our understanding of this prior sociality we might formulate or articulate jurisdiction otherwise by recalibrating its relation between the law that it declares and the law that it reflects. Key to such a recalibration is the way in which we can develop a sense of law beyond the juridical because it is here that we might reanimate the sense of *ius* that is reflected in the jurisdictional moment. Through a study of jurisdiction, then, we might counter the way in which the encroaching juridification of social and political life has obscured – what Stone *et al* describe as – the sense of law as *nomos* or *jus*, law conceived as ‘a social bond or a command to justice’.⁴⁷ The re-working of jurisdiction undertaken in this thesis is part of an effort to resist this juridification where “law” comes to signify nothing but the operations and manoeuvrings within courtrooms, chambers and solicitors' offices. Law should not be left to these legal technocrats alone, law

⁴⁶ It is worth noting here that the theoretical account of jurisdiction I pursue is clearly at odds with a positivist account. In Cover's assessment of jurisdiction, he suggests that judicial authority is ultimately guaranteed by the hierarchy of the court. Cover leaves open the possibility of a ‘natural law of jurisdiction that might supplant the positivist version’ he points to, but does not develop, this idea further. The contention that jurisdiction relies on some prior but informal set of obligations has certain resonances with the natural law account towards which Cover gestures. However, as will become clear below the deconstructive strategies that animate this project work to displace the “natural law / positivism” distinction, opening the law to a beyond of these either/or categories. On positivist jurisdiction see Robert Cover, “*Nomos and Narrative*,” 53-60.

⁴⁷ Matthew Stone, Illan rua Wall and Costas Douzinas, “Law, Politics and the Political” in *New Critical Legal Thinking: Law and the Political*, Stone, Wall and Douzinas eds., (Abingdon: Routledge, 2012), 2.

is also that which is produced from the bottom up, so to speak, by the creativity of people coming together, it is the sharing out of common life. In order to develop this sense of jurisdiction as having an intimate relation with a prior movement of “law,” I turn to deconstructive accounts of legality because it is through this that we might reimagine our *ius commune*.

1.3 Deconstruction

It is worth noting here that my engagement with Derrida represents a second strand to the argument in the thesis. I pursue, what can be loosely described as, a “political” reading of Derrida’s thinking by moving away from the (loosely) “ethical” readings of deconstruction and law that dominates much of the existing approach. The politics at stake in deconstruction are key to how jurisdiction is re-cast as “juriswriting” at the end of the thesis. Before assessing the deconstructive approach to law, as well as setting out how my understanding of the law/deconstruction nexus develops the existing literature on jurisdiction, I want to put this material in some context, outlining some of the deconstructive strategies and approaches that animate my understanding of jurisdiction.

1.3.1 What is deconstruction?

Given that deconstruction disturbs the very notion of stable concepts and categorisations, risking a definition is something of a fool’s errand.⁴⁸ Throughout his work Derrida has sought to demonstrate how concepts are unstable, how strict determinations are always partial and how definitional borders and distinctions are porous. An added difficulty is that the term “deconstruction” has taken on a life of its own far beyond the rather limited sense first attributed to it in *Of Grammatology*. Originally used to refer to Heidegger’s *Destruktion* (or *Abbau*) of metaphysics,⁴⁹ Derrida’s “de-construction” has come to refer to the particular style and approach associated with Derrida’s philosophy in a number of fields and disciplines, most prominently in literary criticism. In this sense, “deconstruction” refers to a style of critique and textual analysis in addition to a specific philosophical strategy and

⁴⁸ For a sense of the difficulties see: Nicholas Royle, “What is Deconstruction” in *Deconstructions: A User’s Guide* (London: Palgrave, 2000), 1-13 and Geoffrey Bennington “Deconstruction is not what you think,” *Art and Design*, 4 (3/4) (1988), 6-7.

⁴⁹ Jacques Derrida, *Of Grammatology*, trans. Gayatri Spivak, (Baltimore: Johns Hopkins University Press, 1997), 10. Interestingly, the term’s first usage suggests that it is analogous to “de-sedimentation” emphasising the relevance of a genealogical method to deconstruction.

mode of thinking. As Derrida remarks, deconstruction is ‘an ugly and difficult word’.⁵⁰ Whilst avoiding a definition, it is nonetheless important to give a sense of what I see to be the key strategies in Derrida’s work, especially those relevant for legal studies, before discussing how this thinking might be brought to bear on the theory of jurisdiction outlined above.

In the film *Derrida*, directed by Kirby Dick and Amy Kofman, Derrida responds to a question about the origins of the term deconstruction. The way he addresses this question reveals a number of his overriding concerns and, in a typically performative mode, manages to show something of deconstruction – or a deconstructive attitude – that a definitional approach might well fail to capture. He says:

Before I answer your question I would like to make a preliminary remark on the totally artificial character of this situation. I don’t know who is going to be watching this film but I would like to underline rather than efface our current technological circumstances and not feign a naturalness that does not exist. I have already started to answer your question about deconstruction because one of the gestures of deconstruction consists, particularly, in not naturalising what is not natural, to not assume that what is conditioned by history, by technologies, by institutions or by society is a natural given.⁵¹

One of the key assertions here is that a complex matrix of influences (history, technology, society etcetera) condition one’s position and these conditions of possibility should be underscored and examined rather than dismissed as “naturally” arising. In this sense deconstruction is partly genealogical and is concerned to unearth the layers of thinking that construct concepts, institutions and practices. Connected to this is a deep sense of responsibility for those things that shape our present views of, and capacity to act, in the world. In this sense, Derrida’s writing has an acute awareness of *what comes before*. This *before*, works as the condition of possibility for the particular issue at hand. Also evident in this brief excerpt – and connected to the concern to account for conditions of possibility – is Derrida’s discomfort with origins. In the passage quoted Derrida constructs a strange temporal logic that troubles the stability of an originary starting point. He begins his answer by not beginning: he says ‘before I answer your question...’ and then midway through his ‘preliminary remarks’ he tells us that he has already begun to answer the question. That

⁵⁰ “Interview with Alan Montefiore” (Oxford Amnesty Lectures, 13 February 1992). Broadcast by Channel 4.

⁵¹ *Derrida* (2002), Zeitgeist Films, translation modified.

which appears peripheral and precursory is in fact central and significant. When, then, do we say that his answer began? The question of the origin must remain ambivalent: that which appears present or original is never present or original *as such* but is dependent on, not only a prior movement of possibility but also, the possibility of retrospective construction and determination.

The distrust of the origin shown in his answer prompts a wider questioning of foundations or grounds that runs throughout Derrida's work. An origin is often evoked to give authority to a particular position. Western philosophy has given a number of accounts of some original point of departure for thinking. Famously Descartes grounded his inquiries into the world and our perception of it on the indubitable fact of his own thought. From this stable point he could begin. But for Derrida, there is no safe or stable starting point. "Foundations" and "origins" are always conditioned by a multiplicity of influences and despite protestations to the contrary are always temporary, partial and contingent. The tropes that can be teased out of this brief passage run through much of Derrida's thought and are, to lesser or greater extents, privileged in the texts, concepts, traditions and institutions to which he subjects his deconstructive inquiries. However, Derrida himself offers two specific ways of understanding deconstruction that are worth some attention.

As is well-known, one of Derrida's central concerns is to question (and invert) traditional binary oppositions that have dominated Western philosophy. Perhaps most famously, in *Of Grammatology* Derrida argues that writing has a priority over speech. Derrida suggests that throughout Western thought writing has been conceived as secondary to speech and of lesser value. The suggestion traditionally made is that speech is a more immediate representation of the subject's thoughts and, consequently, writing is essentially a secondary representation of this first representation of the subject's thought or intention. This makes writing less trustworthy as it is predicated on absence and difference and is a further stage removed from the subject's *present* thinking. As writing is always possible to be divorced from the context and intent in which it is originally given, writing is conceived as potentially corrupt and open to confusion. Speech has a purity and immediacy that writing lacks. This binary opposition between speech/writing is mirrored throughout Western thought in any number of concepts – presence/absence, man/woman, subject/object, black/white – and is a logic crucial to what Derrida calls metaphysics or

logocentrism. In reversing the polarity and suggesting that writing, conceived as a generalised movement of difference and deferral, is in fact prior to speech Derrida undertakes a double movement that he describes in the following way:

despite the general displacement of the classical, “philosophical,” concept of writing, it seems necessary to retain, provisionally and strategically, *the old name*... Very schematically: an opposition of metaphysical concepts (e.g. speech/writing, presence/absence etc.) is never the confrontation of two terms but a hierarchy and the order of a subordination. Deconstruction cannot be restricted... to a neutralization [*sic*]: it must, through a double gesture, a double science, a double writing – put into practice a *reversal* of the classical opposition *and* a general *displacement* of the system.⁵²

Simply reversing polarities and privileging a term that has traditionally been secondary, remains within a metaphysics that Derrida wants to think beyond. Any inversion of binary terms must also be accompanied by a second move that displaces the system that held the binary in stead in the first place.

This double movement of deconstruction is given a slightly different gloss in “The Force of Law.” Evoking the genealogical approach discussed above, Derrida suggests that deconstruction involves a ‘responsibility without limits’ to account for ‘the values, norms [and] prescriptions that have been sedimented’ in the notions of law and justice. This is a political as well as ‘a historical and a philologico-etymological task’ and involves grappling with the legacy of these concepts.⁵³ Derrida suggests that a second movement is also required, that of suspending the very axiom or concept that one is discussing. It is this gesture of suspense that ‘opens the interval of spacing in which transformations, even juridicopolitical revolutions, take place’.⁵⁴ Derrida argues that deconstruction involves a doubled movement of critique, de-sedimentation or genealogy of a concept on the one hand and a suspense of that very concept that opens the possibility of radical change on the other.

These two statements on deconstruction are not intended to be definitive but they do give a clear sense of what is involved in a deconstructive inquiry. It is this double movement that the present thesis hopes to emulate by at once excavating the conditions of possibility of jurisdiction and accounting for its varying shades of meaning and effects but also displacing

⁵² Derrida, *Limited Inc.*, trans. Samuel Weber (Evanston: Northwestern University Press, 1988), 21.

⁵³ Derrida, “Force of Law: The ‘Mystical Foundation of Authority,’” in *Acts of Religion* (New York: Routledge, 2002), 248.

⁵⁴ *Ibid.*, 249.

the economy (and metaphysics) that keeps the dominant conception of jurisdiction in place. One final point should be made. As the epigraph to this introduction suggests, the “double move of deconstruction” should not be read as being strictly methodological. A method suggests that one knows how to proceed, that certain parameters of inquiry are presupposed and the ultimate aims of an endeavour are clearly defined. In contrast to such a thinking, a deconstructive attitude is always open to the unforeseeable, opening a space for the coming – and thinking – of otherness.

1.3.2 Deconstruction and Law

Since Derrida’s address to the Cardozo Law School in 1989 – entitled “The Force of Law: The ‘Mystical Foundation of Authority’” – the literature on deconstruction’s relation to law, justice, and judgement has proliferated. Derrida’s “The Force of Law” remains an essential text for any account of deconstruction and the law and I give a very brief reading of it here, highlighting in particular, how the aporetic nature of law/justice that Derrida identifies helps in the discussions of jurisdiction that follow.

The approach that initially dominated understanding the deconstruction/law nexus was a reading of Derrida that dwelt on his sympathy for, and compatibility with, the work of Emmanuel Levinas. Throughout the 1990s Derrida became increasingly interested in questions of ethics, politics and hospitality⁵⁵ and many commentators found Levinas to provide a useful supplement to Derrida’s thinking in this area. Put crudely, Levinas contends that ethics has a priority over ontology; that is, our first philosophical questions are of the Other, concerned with addressing the face of the Other and with a responsibility to account for the singularity or absolute otherness of each Other. Levinas has a deep suspicion of ontology which, he claims, reduces the otherness of each singularity to *the Same*, levelling all alterity to a homogeneity.⁵⁶ With a focus on Derrida’s later work, a

⁵⁵ Key texts from this period include: Jacques Derrida, *Adieu to Emmanuel Levinas* (Stanford: Stanford University Press, 1999); Jacques Derrida, *A Taste for the Secret* (Cambridge: Polity, 2001); Jacques Derrida, *A Gift of Death* (Chicago: Chicago University Press, 1995); Jacques Derrida, *Of Hospitality* (Stanford: Stanford University Press, 2000); Jacques Derrida, *The Other Heading* (Bloomington: Indiana University Press, 1992); Jacques Derrida, *Politics of Friendship* (London: Verso, 1994); Jacques Derrida, *Rogues: Two Essays on Reason* (Stanford: Stanford University Press, 2005); Jacques Derrida, *Spectres of Marx* (London: Routledge, 1994).

⁵⁶ Levinas’s two most important studies are: *Otherwise Than Being* (Pittsburgh: Duquesne University Press, 1998) and *Totality and Infinity: An Essay on Exteriority* (Pittsburgh: Duquesne University Press, 1969). The distinction between *the Same* and *the Other* is crucial for Levinas. For him ontology relies

number of important studies explore the extent to which Derrida's thinking of law and justice is essentially ethical (in a Levinasian register), that is, Derrida is primarily concerned with the question of a justice to and for otherness.⁵⁷ Underscoring Derrida's assertion in "The Force of Law," and elsewhere, of an irreducible conflict between the generality of the law and the singularity of the subject before the law,⁵⁸ it has been argued that deconstruction calls for an ethical responsibility to singularity before the law, rather than the legal system as a whole. As Cornell puts it, deconstruction is 'an aspiration to a non-violent relationship to the Other'.⁵⁹ Some have felt that this reading left deconstruction with only ethical rather than a truly political potential⁶⁰ whereas others saw this thinking as providing a necessary corrective to the violence of the law.⁶¹ With an emphasis on the absolute singularity of each subject and the impossibility of ever justly settling competing claims before the law, some have even given this a gloss that suggests that deconstruction has a deep sympathy with liberalism.⁶²

The ethical orientation to Derrida's later writing is clear and strong resonances can be felt between Levinas and Derrida's projects. However, these readings tend to focus on only one aspect of Derrida's thought.⁶³ The thrust of this literature claims that Derrida's thinking of

on a logic of *the Same* and perpetuates a violence by claiming a "finite totality" which excludes the "infinite alterity" of the Other.

⁵⁷ The most important studies in this regard are Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992) and Simon Critchley, *The Ethics of Deconstruction: Derrida and Levinas* (Edinburgh: Edinburgh University Press, 1992). One notable exception to the purely Levinasian reading is the work of Costas Douzinas who, whilst certainly engaging with Levinas and Derrida's commitments to alterity, also holds a deconstructive account of the law open to radical political potential. This is perhaps most clearly evidenced in Douzinas's efforts to bring to the fore Derrida's engagement with Marx and articulate, what Douzinas refers to as, a "cosmopolitanism to come". See Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (London: Routledge, 2007), 293-296.

⁵⁸ See Derrida, "The Force of Law," 251-258 and Derrida, "Before the Law" in *Acts of Literature* ed. Derek Attridge (London: Routledge, 1992).

⁵⁹ Cornell, *The Philosophy of the Limit*, 62.

⁶⁰ Critchley, *The Ethics of Deconstruction*, 189-190. Here Critchley asserts that 'deconstruction fails to thematize the question of politics as a question... the rigorous undecidability of deconstructive reading fails to account for the activity of political judgment, political critique, the political decision'.

⁶¹ Douzinas and Geary credit the "Force of Law" as instigating an 'ethical turn in critical legal studies'. Costas Douzinas and Adam Geary, *Critical Jurisprudence* (Oxford: Hart Publishing, 2005), 9.

⁶² See F. Michelman, "Postmodernism, Proceduralism, and Constitutional Justice: A Comment on Van der Walt and Botha" *Constellations* 9 (2002), 246-262.

⁶³ In particular such "ethical" readings of deconstruction have generally failed to account for Derrida's early engagement with Levinas in "Violence and Metaphysics". Here Derrida, though clearly sympathetic to Levinas, makes certain marked differences between the two clear. For a thorough examination of the connection between Derrida and Levinas and a critique of Critchley and Cornell see Martin Hägglund, *Radical Atheism: Derrida and the Time of Life* (Stanford: Stanford University

law, justice, ethics and politics is, firstly, something that came late in his work (evidenced in what some call an “ethical turn” in deconstruction) and, secondly, solely influenced by, and perhaps even synonymous with, Levinas’s philosophy. The difficulty with maintaining this position is that Derrida himself was very clear that his thinking has always been political: ‘the thinking of the political has always been a thinking of *différance* and the thinking of *différance* always a thinking of the political, of the contour and limits of the political, especially around the enigma or the autoimmune double bind of the democratic’.⁶⁴ The ethical reading of deconstruction fails to account fully for the ethico-political significance of Derrida’s early work, partly – as this quotation suggests – by not seeing the inherently political nature of Derrida’s infamous quasi-concept, *différance*.⁶⁵ Furthermore, the ethical reading, with its positing of an “ethical turn,” fails to grapple with the way in which Derrida approaches the notions of “law” and “justice” throughout his work. Not only does Derrida describe deconstruction as justice,⁶⁶ but he also describes deconstruction as the Law, as ‘an affirmation on the side of the Law’.⁶⁷ It is clear that Derrida is concerned to account for a responsibility to the otherness of the other in a legal dispute and his writing certainly gestures towards the possibility of an hospitable encounter with the other. However, much of this early scholarship on deconstruction and the law stopped short of giving an account of deconstruction and law, in the round. In particular, by thinking of Derrida’s concerns with ethics and law as a “turn” or marked shift in his work, many thinkers have failed to account for the doubled logic of deconstruction outlined above. Deconstruction involves a *displacement of the system as a whole*, not simply the reversal of particular terms or a privileging of categories within a given system. If we take this as our point of departure, Derrida’s thinking – if it is to match up to his declared ends – must be more radical than the ethical reading of deconstruction/law credits.

Press, 2008), 76-106. As Hägglund demonstrates, Derrida departs from Levinas in that Levinas retains a conception of the Other as absolute, as somehow purely and totally other and a peaceful relation with this absolute Other remains a regulating ideal for our ethics. Derrida, in contrast, denies that such a peaceful relation is even desirable, arguing that there is a more radical contamination of “self” by an already compromised “other.”

⁶⁴ Jacques Derrida, *Rogues: Two Essays on Reason* (Stanford: Stanford University Press, 2005), 39.

⁶⁵ In what follows I tease out the political significance of *différance* by connecting Derrida’s thinking to Nancy’s assertion of the primary communality of being or “being singular plural.” This is developed in detail in chapter four.

⁶⁶ Derrida, “Force of Law,” 243.

⁶⁷ Jacques Derrida, “Women in the Beehive: A Seminar with Jacques Derrida,” *Differences: A Journal of Feminist Cultural Studies* (2005), 149.

Following Derrida's death in 2004 the literature on deconstruction and the law has taken a different approach. Two studies are worth particular mention: Jacques de Ville's *Law as Absolute Hospitality* and Catherine Kellogg's *Law's Trace: From Hegel to Derrida*.⁶⁸ Rather than focus on the ethical writings of the 1990s, Kellogg and de Ville suggest that Derrida's work on law must be understood in relation to his wider philosophical concerns with the history of Western thought and the so-called "metaphysics of presence". With close attention to his early work – Kellogg is particularly concerned with Derrida's engagement with Hegel in *Glas* and elsewhere – a far richer understanding of Derrida's thinking of law/justice emerges. In particular, both argue against the ethical/liberal reading discussed above and position Derrida as a radical and deeply political thinker.⁶⁹ Crucial to both de Ville and Kellogg is the idea that Derrida's articulation of an encounter between the singularity before the law and the generality of the legal system which aspires to universal application, is but the first step in a more radical displacement or suspension of the economy that keeps the law/justice binary in place. As Derrida writes in "The Force of Law," he seeks to 'reserve the possibility of a justice, indeed a law [loi] that not only exceeds or contradicts law but also, perhaps, has no relation to law or maintains such a strange relation to it that it may just as well demand law as exclude it'.⁷⁰ In de Ville and Kellogg's readings, this insistence on the possibility of contradicting extant law *in the name of the law* reveals a radical possibility within deconstruction. It suggests that Derrida's critique is not limited to an ethical injunction. Rather, Derrida identifies a site for political struggle and contestation in this encounter between law and justice. This in turn opens up the possibility of the law being radically otherwise. Addressing the work of (post)deconstructive legal philosophers, de Ville suggests that, 'their task... would be to bring to the fore the aporia within every legal concept, to move law beyond what is simply possible... At stake is thus a movement away from essence, consistency and truth towards the (dangerous) logic of the perhaps'.⁷¹

⁶⁸ Jacques de Ville, *Law as Absolute Hospitality* (Abingdon: Routledge, 2011) and Catherine Kellogg, *Law's Trace: From Hegel to Derrida* (Abingdon: Routledge, 2010).

⁶⁹ In this respect, we might read Kellogg and de Ville as expanding on Beardsworth's early account of the politics of Derrida's thought. First published in 1996, this approach goes somewhat against the grain in terms of Derrida scholarship of its time, giving a philosophically nuanced account of the political significances of deconstruction, rather than focus on ethical and/or Levinasian themes and concerns. This study has largely been overlooked in contemporary accounts of Derrida and the political, perhaps because the book was published before Derrida's more explicitly political writings in *Spectres of Marx*, *The Politics of Friendship* and *Rogues*. See Richard Beardsworth, *Derrida and the Political* (London: Routledge, 1996).

⁷⁰ Derrida, "Force of Law," 233.

⁷¹ De Ville, *Law as Absolute Hospitality*, 199.

It is to this latter strand in the literature on deconstruction and law – and, in part, de Ville’s specific provocation for the legal philosophers of tomorrow – that the present thesis seeks to address. Rather than dwell on ethical imperatives and sensitivities towards the Other, the thesis assesses the concept of jurisdiction, what we might refer to as the law’s liminal concept *par excellence*, in order to expose ways in which a general displacement or suspension of extant legal categories and thinking might be possible. By identifying the aporia of jurisdiction – the dual imperative, discussed above, of determination and reflection – I explore openings within the law and examine the latent potential within the law itself for thinking legality otherwise. To expand on this, I want to turn briefly to “The Force of Law” to illustrate how Derrida’s thinking helps develop a deconstructive account of jurisdiction.

The “law” at stake in Derrida’s philosophy is no easy matter. As the translator of “The Force of Law” notes:

The translation of the word *droit* into English is notoriously difficult... The word carries the sense of “law” and “code of law,” and the sense of “right” (as in “the philosophy of right” but also of course as in “the right to strike” or “human rights”). The word *law* has seemed [in this translation of “Force of Law”] the most economical translation, even if not entirely appropriate in all instances. One should also keep in mind that this choice for translation does raise the problem of differentiating between law (*droit*) and law (*loi*).⁷²

The difference between *loi* and *droit* is itself not insignificant. *Loi* can refer both to the legal system as a whole and “the law” in its most general sense as in “laws of the jungle” (*la loi de la jungle*) or “being a law unto oneself” (*on ne connaît d’autre loi que la sienne*) whereas *droit* (whilst also capable of describing a set of laws or norms) also refers to specific legal/civilly sanctioned duties and responsibilities, “the right to asylum” (*droit d’asile*) or “copyright” (*droit d’auteur*). This difficulty of translation is re-doubled because Derrida has a specific and, on first blush, an apparently contradictory usage for *la loi*. As Jacques de Ville observes:

When Derrida speaks about law, a doubled law is... often at stake, for example “the unconditional law of hospitality” and the *laws* which in a concrete sense regulate hospitality in a conditional sense. In *Of Hospitality* Derrida speaks of this unconditional law... as “above the laws” and “thus illegal, transgressive, outside the law, like a lawless law, *nomos anomos*,

⁷² Translator’s note, Derrida, “Force of Law,” 230, n. 1.

law above the laws and law outside the law"... Deconstruction, the law (itself), absolute hospitality and justice can thus be said to refer to the same "thing".⁷³

Derrida, it seems, uses a particular rendering of Law (*Loi*) rather than *droit* because of the broader connotations associated with the former term.⁷⁴ This insight complicates the encounter between law and justice that Derrida describes in "The Force of Law". As is well-known, Derrida characterises law as "calculable," determinative and 'essentially *deconstructible*'.⁷⁵ Justice, on the other hand, is 'incalculable' and described alternatively as the 'experience of absolute alterity'.⁷⁶ It is this encounter between an essentially calculating and deconstructible law and an incalculable and undeconstructible justice that gives rise to, what the "ethical reader" of "Force of Law" would describe as an injunction to be just (however impossible that may) with the absolute otherness of the singularity before the law. However, such a reading does not address Derrida's insistence on 'a law [*loi*] that not only exceeds or contradicts law but... [has] such strange relation to it that it may just as well demand law as exclude it'.⁷⁷ How does this "other law" fit with this seemingly binary opposition between law and justice?

It is here that I would suggest something of a tripartite structure to the law in "Force of Law." We have the law – usually rendered *droit* – as positive, determined and violent. This law is bound to calculation and delimitation, to a strong sense of community, to the laws that enforce conditional hospitality and so on. Then we have another law – usually, *le loi* in French and frequently capitalised – as unconditional, wholly inoperative, and ungrounded. This is the "other law" that de Ville describes, it is a law akin to absolute hospitality,

⁷³ De Ville, *Law as Absolute Hospitality*, 39.

⁷⁴ We should note here that Derrida's use of *droit* and *loi* does not directly correspond to the *ius / lex* distinction. As Hobbes points out in his discussion of natural right and natural law (chapter 14 of *Leviathan*), *ius* – in addition to the sense ascribed to it above – is associated with "right," that is the right to do something or forbear from doing it. *Lex* is "law" in the sense that it binds and takes the form of a command. Though I may have a "right" (*ius*) to something, I am not necessarily obligated by law (*lex*) to do it. See Thomas Hobbes, *Leviathan* (Indianapolis, Hackett Publishing, 1994), 79-81. The French *loi* is an inheritance of *lex* and so might naturally be thought to refer to positive law. *Droit* comes from *ius*, and might be thought to be associated with the lore of a community. However, the confusion is redoubled because the French *droit* has its root in the Latin *directus* referring to correction, alignment or distribution and so too, has an inference with that which binds or delimits. Derrida's use of the *droit / loi* distinction is, perhaps, idiosyncratic. Nonetheless, in both the *ius / lex* division and that (as used by Derrida at least) of *droit / loi* we have a sense of law as, on the one hand, positive and formal, found in written or positive law, and on the other hand, and informal, unwritten law in excess of the first category.

⁷⁵ Derrida, "Force of Law," 242

⁷⁶ *Ibid.*, 244 and 257.

⁷⁷ Derrida, "Force of Law," 233.

différance, iterability and even justice. Lastly, and most importantly, there is a third term, still that we could identify as “a law,” that is the generative encounter between these two poles. We might frame this in terms of aporia but so too might we connect this to what Derrida describes as the necessary second gesture in any deconstruction: *that of the displacement of the system as a whole*. This third term of the law names the site at which both terms exceed the other and the system of metaphysical oppositions on which the two terms depends is displaced, however fleeting and chimerical that experience might be. That there is a structural possibility of this encounter is “a law.” But this is a law that exceeds both law and justice, it is a law that instigates the suspension or displacement of the economy that keeps the law (or *droit*) / justice (or *loi*) binary in place.

This is all rather abstract and remains at a cursory stage. To understand how this tripartite structure helps with the present concerns with jurisdiction let us turn back to some of our comments above. Following Cormack and Costa we can assert a doubled logic to jurisdiction. Jurisdiction reflects an existing informal “legality” but also announces law as such, giving voice to positive law. The thesis develops the notion that we can think of jurisdiction as being the third space of law, naming the site of a generative encounter between law as formal, calculable and determinate and law as informal, incalculable and indeterminate. It is in this space that the work of jurisdiction takes place. By putting a number of Derrida’s texts on the law in conversation with jurisdictional techniques and events, the thesis expands on this structure to jurisdiction. Crucial for this reading of jurisdiction is the idea that jurisdictional techniques and practices are sites that not only inscribe positive law and make visible certain divisions and distinctions, jurisdiction is a site open to critical intervention and occupation. In attending to jurisdiction’s role as a mediator between two lawful registers, possibilities open for thinking and writing the law otherwise. It is in this space that we might sense the promise of deconstruction, opening the law to the “dangerous logic of the perhaps”.

1.3.3 Why Jean-Luc Nancy?

Throughout the thesis, in addition to Derrida, I draw on the work of Jean-Luc Nancy. Nancy provides a useful supplement to Derrida’s thinking by giving a detailed account of

community and the bare fact of our “being-with” in the world.⁷⁸ Nancy’s philosophy is, perhaps primarily, concerned with a critique of the liberal, monadic subject. Tackling a staggeringly diverse set of problems and areas – from readings of classical philosophers to comments on visual arts, from explicitly political concerns (indeed the nature of “the political” as such) to innovative renderings of canonical terms such as “freedom,” “being” and “space” – Nancy develops a thinking of multiplicity, sharing and fracture rather than a thinking of oneness, integrity or the absolute. As Ian James suggests, Nancy’s heterogeneous corpus should be seen as ‘a response to a fragmentary demand, or rather to a demand made by the fragmentary’.⁷⁹ Nancy’s thinking in this sense represents a direct challenge to traditional conceptions of sovereignty. The indivisible, self-referential, transcendent sovereign is anathema to Nancy’s philosophy. As already suggested, jurisdiction, in contrast, is often thought to be intimately bound up with the logics of sovereignty, instrumental in maintaining the sovereign integrity of a territory or community. By drawing recent critical reflection on jurisdiction towards Nancy’s thinking of sharing, fragmentation and inoperativity, I hope to expose the fragility of jurisdiction’s claim to determine the limits and possibilities of the law.

Jurisdiction is always a matter of *jurisdiction of* or *jurisdiction over* somewhere, someone or something. Jurisdiction cannot exist as a pure abstraction, rather jurisdiction always takes place *in relation* to subjects, territory or community. Territorial jurisdiction ties jurisdiction to the land and to the ability to demarcate and delimit space. Moving away from this territorial paradigm, I explore the ways in which jurisdiction can be also seen to have a constitutive relation with community. Traditionally conceived, community might be thought to conform to the kind of binary distinctions with which we took issue earlier when discussing territorial jurisdiction. Community is usually thought to depend on the ability to exclude some and admit others. However, Nancy’s account of community as “inoperative” or “un-working” provides a deconstructive account of community, suggesting that “community” can be understood as a restless “being-together” that resists both the immanence and transcendence of traditional conceptions of the principle. This is no easy

⁷⁸ See in particular Jean-Luc Nancy, *The Inoperative Community*, trans. Peter Connor, Lisa Garbus, Michael Holland, and Simona Sawhney (Minneapolis: University of Minnesota, 2003) and Jean-Luc Nancy, *Being Singular Plural*, trans. Robert D Richardson and Anne E O’Byrne (Stanford : Stanford University Press, 2000).

⁷⁹ Ian James, *The Fragmentary Demand: An Introduction to the Philosophy of Jean-Luc Nancy* (Stanford: Stanford University Press, 2006), 2.

matter and understanding Nancy's account of community and his ontology of "being-with" forms the basis of the fourth chapter so I will not go further here. The key thing that Nancy provides, however, is a sense of jurisdiction's role in both creating and disrupting legal and political communities and collectives.

Nancy's thinking, with its emphasis on an originary co-implication of self and other, provides a useful supplement to Derrida throughout the project. Derrida was deeply suspicious of notions of "community," conscious always of the very worst connotations – fraternalism, nationalism and totalitarianism – that have often been associated with the term. Nonetheless, deep sympathies run between Nancy and Derrida's work and reading Derrida with an eye to Nancy reveals another shade to Derrida's thinking. As the ethical readings of deconstruction in the 1990s turned to Levinas, I turn to Nancy to expand on a political current within Derrida's work and to explore the politics at stake in jurisdictional practices and techniques.

1.4 Conclusion

Deconstruction is primarily concerned with an inquiry into the conditions of possibility of texts, institutions and life. By refusing to treat particular phenomena as "naturally" arising, deconstruction insists on the importance of unpicking that which precedes, and thus shapes, particular texts, concepts and practices. Deconstruction contends that understanding this prior movement not only accounts for the conditions of possibility of things but also explains how determinations always undo themselves, how things are exceeded and disrupted by the very movement that allows them to come to presence. In assessing the law, deconstruction suggests that the strict delimitations and determinations associated with the positive law obscure an other law at work, a law of *différance* or inoperativity that exceeds the positive law's appetite to cut, demark and divide. Following Pietro Costa and Bradin Cormack – along with Blanchot and Swift's assessment of the law's desire to marshal its speech – we can assert similar concerns at work in jurisdiction. The territorial, and territorially inspired, conceptions of jurisdiction present jurisdiction as a matter of binary delimitation, leaving little or no room to reflect on the conditions of possibility at work before jurisdictional practices, events or procedures. But juris-diction – the speaking of *ius* – is dependent precisely on an informal architecture of social relations, it is this that provides its conditions of possibility. Following the deconstructive suggestion

that this sense of *ius* not only precedes but overflows and disturbs jurisdiction's line drawing obsessions, the following chapters assess privileged moments in which this movement can be observed. This is done first, in the following chapter, by examining how narrative, fiction and technicity are put to work in constructions of the common law.

Chapter 2

FROM JURISDICTION TO JURIS-FICTION

As a system... the common law is a thing merely imaginary (Jeremy Bentham)¹

Could any law put into being something that did not before exist? It could not. Law can only modify the conditions, for better or worse, of that which already exists (D.H. Lawrence)²

2.1 Introduction

That jurisdiction gives shape to legality and lawful relations may appear obvious. The demarcations between criminal and civil law, tort and contract, or between two or more territories is commonly associated with the work of jurisdiction. It is jurisdiction that delimits the scope and nature of legal authority, it is jurisdiction that produces the law's determinate form. As discussed in the previous chapter, much of our thinking of this function of jurisdiction, however, rests on a territorial paradigm that associates this work of shaping and forming with delimitation and division alone. Such a conception presents jurisdiction as a matter of binary constructions: you are either inside or outside a particular jurisdiction. In this chapter I want to explore another aspect to jurisdiction's ability to shape the law. Taking as its point of departure Derrida's assessment of the co-appearance of the literary and the legal in "Before the Law," I argue that jurisdiction creatively fashions a narrative impression of the law. Rather than being purely associated with the line-drawing obsessions of the cartographer, I argue that the creative work of jurisdiction might also evoke the figure of the poet or storyteller. This process of creative jurisdictional fashioning,

¹ Jeremy Bentham, *A Comment on the Commentaries*, ed. C. W. Everett (Oxford: Clarendon Press, 1928), 125. Famously, Bentham was a vociferous critique of the common law. Bentham argued that the common law's avowed connection to Natural Law prevented the law being subject to progressive change and obscured the true nature of law itself, which for Bentham was purely positive. See Jeremy Bentham, *A Fragment on Government with An Introduction to the Principles of Morals and Legislation* (Oxford: Basil Blackwell, 1948), 3-8.

² D. H. Lawrence, *Study of Thomas Hardy and Other Essays* (Cambridge: Cambridge University Press, 1985), 10.

I suggest, takes place in an aporetic encounter between two legal registers: the positive law and (following Derrida's terminology) "the law before the law". Jurisdiction on this reading is process of *technê* that creates a contingent impression of the law.³ I trace this argument through the constructions of the common law in the sixteenth and seventeenth centuries, giving a particular focus to *Calvin's Case* (1608), a decision that determined the jurisdictional reach of English common law to Scottish subjects. Through this historical study I suggest that an analogous structure can be drawn between the early modern and postmodern conceptions of law that, in turn, exposes jurisdiction's art or technicity. The chapter suggests that we can characterise this conception of jurisdiction – following a term coined by Nancy – as "juris-fiction". A shift in register from jurisdiction to juris-fiction exposes the contingencies on which the law rests and invites a critical opening within the law.

2.2 Before the Law

Kafka's parable *Vor dem Gesetz*, first published in 1915 in its own right, forms part of *The Trial* where it is recounted to Joseph K by a priest as K tours a cathedral.⁴ As is well known, the story tells of a man from the country who seeks admittance to the Law (*das Gesetz*). Before the Law stands a doorkeeper, attending a gate that stands open, as usual. The countryman heeds the doorkeeper's advice to defer entry "at the moment," hoping that the veto will be lifted in the future. Such difficulties the man did not expect as he thought that the Law was accessible at all times, to everyone. The man's waiting continues for years throughout which time he begs the doorkeeper for admittance. He offers all his possessions to bribe the doorkeeper and even, in his childlike old age, begs the fleas on the doorkeeper's

³ *Technê* is usually translated as craft, skill or art. This term has an ancient heritage and is central to many classical philosophical concerns from Plato, Aristotle and the Stoics to Heidegger, Nancy and – most recently – Bernard Stiegler. The present chapter does not engage with the numerous interpretations offered in Western thought on the question of *technê* especially its ambivalent and complex relation to *epistêmê*. The important thing for our present concerns is that jurisdiction conceived as a species of *technê* emphasises the ways in which jurisdiction *produces* a particular conception of law, lawful relations and the legal limit. This production is not necessary but *contingent* on a number of competing factors. Jurisdiction is here conceived as *technological* in the sense that it fashions and forms a sense of legality in a "third space" between two separate, though connected, registers of law.

⁴ The priest claims that the story is taken from the "the writings that preface the Law" and suggests that the tale illustrates K's delusion about the nature of the court. See Franz Kafka, *The Trial*, trans. W. Muir and E. Muir (London: Everyman's Library, 1992), 234-236. The chaplain who is the first to interpret Kafka's tale turns out to be the prison chaplain and therefore a member of the court and in cahoots with the law.

collar for help in his cause. The countryman's final request is to know why for all the years that he has waited for admittance no one else has ever sought entry to the Law. The doorkeeper bends down to roar in the man's ear: "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it".⁵

One of the tropes that has produced much comment is the confrontation in the story between the singularity of the man who comes before the Law and the generality of the Law that he encounters. This is made all the clearer by the man's humble origins as a "man from the country" and the generality of *Gesetz* (referring to law in general rather than particular laws (*Recht*) that confronts him; *Gesetz* is helpfully capitalised as "Law" in translation. The failure of the countryman to access the Law is a constitutive failure of the Law to be just with the singularity of the those that appear before it. Whilst this analysis forms part of Derrida's reading of the text, the aspect of his interpretation that I would like to focus on is the idea that the tale tells of the countryman's ultimately failed attempt locate the origin of the law. In exploring this ineluctable desire to enter the Law, Derrida puts Kafka story in conversation with Freud's fable of the founding of the moral law in *Totem and Taboo*. Freud's own narrative is dictated, likewise, by a certain failure: in an effort to fix and determine the origin of the law and identify a stable and transcendental referent about which the law can orientate, Freud manifestly fails. As Derrida comments, Freud's fable recounts a "non-event" where nothing happens, no (transcendental) origin is located.⁶ Peter Fitzpatrick argues that the power of Freud's myth of foundation is to reveal the impossibility of maintaining a stable origin and the efficacy of Freud's tale is to put modern law's grounds in question. This failure to locate the law's origin 'proves to be a productive

⁵ Franz Kafka, "Before the Law" in *The Complete Short Stories of Franz Kafka* (London: Vintage, 1999), 3-4. Kafka's tale has become a canonical text in critical legal studies and the philosophy of law and has provoked a number of readings. I found the following particularly helpful: Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Oxford: Hart Publishing, 2005), 336-362; Elena Loizidou, "Before the Law, encounters at the borderline" in *New Critical Legal Thinking* (Abingdon: Routledge, 2012), 181-197; Hélène Cixous, *Readings: The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva* (Minneapolis: University of Minnesota Press, 1991), 14-19; Jacques de Ville, "Before the Law" in *Jacques Derrida: Law as Absolute Hospitality* (London: Routledge, 2011), 74-94; George Dargo, "Reclaiming Franz Kafka, Doctor of Jurisprudence" *Brandies Law Journal* 45 (2006-7), 495; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 49-62.

⁶ Derrida, "Before the Law," 199

failure'⁷ that exposes a non-transcendental referent at the heart of the law. It is this prior work before the law that Derrida explores in his reading of Kafka and Freud.

Originally given as a lecture in London, an expanded version of Derrida's text was presented at the Colloquium at Cerisy on Jean-Francois Lyotard in 1982 and later published in the conference proceedings as *Préjugés: Devant la loi* ("prejudices," "pre-judgment" or "precedent" before – as in, in front of⁸ – the law). This earlier title stresses the manoeuvrings at work before one finds oneself before the law. There are not only precedents but prejudices that dictate who appears, and how and why one appears, before the law. Derrida was all too aware of such prejudices. In 1981 he was arrested in Prague on trumped-up charges of producing, trafficking and transferring drugs. The arrest followed his involvement in an outlawed seminar with Czech dissident intellectuals organised by the Jan Hus Educational Foundation that sent money and books and hosted events in solidarity with those opposing the then, totalitarian, Czech government.⁹ Alluding to these events in "Before the Law," Derrida mentions that his lawyer appointed by officials in Prague, said to him "You must feel that you are living a story by Kafka" and urged him "not to take [the situation] too tragically, live it as a literary experience".¹⁰ It is precedents – in the broadest sense – that determine a certain logic to the law that is Derrida's focus in his reading of Kafka's tale. Derrida identifies this prior work before (juridical) law, as itself a "law." However, before we turn to the question of how we might characterise this "law before the law," I want to attend to the jurisdictional orderings implicit in both Kafka's story and Derrida's reading. Such a focus on the jurisdictional provokes questions that are pursued throughout this chapter, particularly the significance of the connection between jurisdiction and the fictional or literary. On his return to France after the brief but undoubtedly unpleasant experience in Ruzyně, Prague's prison, Derrida was interviewed about his misadventure for television but immediately felt stymied by the medium. He later reflected that what he wished to say was that "what I really lived through... would demand a different

⁷ Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), 12.

⁸ Unlike the German *vor* ("before") the French *devant* does not suggest the doubled meaning of spatial and temporal priority. *Devant* refers to a spatial priority (being before or up in front of the law) whereas *avant* refers to a temporal priority, a time before which the law has been established. See the translator's note, Derrida, "Before the Law," 200, n. 13.

⁹ For an account of Derrida's time in Prague see, Benoît Peeters, *Derrida: A Biography*, trans. A. Brown (Cambridge: Polity Press, 2013), 332-341.

¹⁰ Derrida, "Before the Law," 218

form of narration, another poetics than that of the evening news”.¹¹ It is such a yearning for a different narration and poetics of the law that animates the present chapter.

2.2.1 The jurisdiction of Before the Law

In one sense, Kafka’s tale is quintessentially jurisdictional. A border is erected that determines the legal limit and this border is policed by an agent of the law who prohibits entry into the law’s jurisdiction. In its elliptical narration the story captures something fundamental to a juridical conception the law: the law determines, cuts and divides, it demarcates in visible ways that which is within and without its borders. This legal line-drawing is achieved through jurisdictional techniques and practices that make determinate, visible and knowable the legal limit. But Kafka’s tale complicates the inside/outside binary on which jurisdiction seems to depend. It is clear that the man from the country is excluded from the Law but in his exclusion he is captured by the Law, held in place at its outermost limit: the countryman is outside the law but still under its sway. As is clear, the gatekeeper protects the Law’s interiority and the countryman is kept outside the law. But the limit is not a strict delimitation, the interiority of the law reaches out to its outside and has an effect beyond its borders. Without this reaching out – without an even limited permeability of the limit – the countryman could not have his oblique encounter with the Law. Following Nancy and Agamben we can characterise this as a logic of “abandonment” by which that which is seemingly excluded by law is nonetheless captured by law.¹² As Motha has pointed out ‘abandonment involves being banished from a particular jurisdiction... [but] to be cast outside a certain order is in another sense to be subject to an order’.¹³ Kafka’s tale hones in on the ambivalent nature of the legal exclusion revealing a force to the law both within and without its borders.

It is an ambivalent relation between the inside and outside that animates Derrida’s reading of *Vor dem Gesteiz*. I read Derrida’s analogy between the text’s subject matter and formal structure, on the one hand, and the external conditions of possibility for the text’s existence

¹¹ Quoted in Catherine Malabou and Jacques Derrida, *Counterpath: Travelling with Jacques Derrida* (Stanford: Stanford University Press, 2004), 174.

¹² For Agamben’s discussion of Nancy’s notion of the “ban” and “abandonment” see, Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller-Roazen (Stanford: Stanford University Press, 1998), 58-59.

¹³ Stewart Motha, “Guantanamo Bay, Abandoned Being and the Constitution of Jurisdiction” in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (Abingdon: Routledge, 2007), 78-79.

as a work of “literature,” on the other, as a meditation on jurisdiction. Derrida argues that an understanding of the “internal geography” of the text, as well as its relation with external axiomatic presumptions is key. Firstly it is suggested that in confronting this text we¹⁴ immediately presuppose that it represents a closed or unified whole: there are ‘boundaries or limits [that] seem guaranteed by a set of established *criteria* – established, that is, by positive rules and conventions’.¹⁵ For our purposes, it is significant that the established criteria for judging this text are themselves assured *by the law*. The supposed unity and delimitation of the text depends on a series of legal norms asserting the sovereignty of the author, a natural connection (‘rooted in natural law’) between the author’s intention and the work, the veracity of claims to intellectual property and so on.¹⁶

We can see, then, that Derrida presents Kafka’s tale as having a jurisdictional determination in two senses. Firstly, a quasi-territorial jurisdiction is posited that supposedly delimits the text’s borders and posits the text as having an identity and unity free from external corruption or interference. Secondly, this unity is guaranteed by a wider jurisdictional framing in which a number of established conventions concerning copyright, authorship, the effect of signature etcetera all circulate. These two senses of the jurisdictional nature of the text are mutually constitutive and are an essential part of the “prejudices” or “precedents” that are presupposed before we find ourselves before this (or any other) text. There is then what we might call an “internal jurisdiction” to the text that delimits its own borders and works to guarantee its unity and an “external jurisdiction” (ultimately enforceable in courts of law) that gives such claims force. This play between the internal and external jurisdictional orderings on which Kafka’s text depends is given particular focus in Derrida’s reading of the function of the title of the piece. Here Derrida notes a topology to the story, suggesting that the title occupies an anomalous space at once outside and inside the text’s borders which troubles the story’s supposed integrity. The title *Vor dem Gesetz* stands outside the text’s internal geography, outside its jurisdiction. But the very same expression forms the first line of the story: *Vor dem Gesetz steht ein Türhürter* (“Before the

¹⁴ Derrida is an unlikely candidate to evoke the notion of a “we,” if this is supposed to refer to a stable or determined collectivity. As Derrida makes clear in the opening lines of his analysis, he refers to a community of readers (‘a little rashly perhaps’) who share a similar set of inherited conventions in approaching a text that is assumed to be “literary”. It is submitted that the invocation of the “we” is purely strategic because it is precisely the presuppositions that supposedly undergird the community of readers that Derrida’s reading of Kafka puts in question.

¹⁵ Derrida, “Before the Law,” 185.

¹⁶ Ibid., 185 and 215.

Law stands a doorkeeper”). But, Derrida suggest, these two phrases are ‘homonyms rather than synonyms, for they do not name the same thing’.¹⁷ In the first instance, the text itself is named and this naming takes place from outside the text’s internal logic, geography and sense. In the second instance, the phrase names a space that the man from the country occupies *within* (the geography of) the story itself, a location before the law. These first few words of the story are in a sense still *before* the story, at least before the story’s narrative proper. Equally, the title itself is not cut off from the story *tout court*, it is held, like the man from the country, in suspense outside-inside the text’s jurisdiction. And all this happens within the “internal jurisdiction” of the text. The title is also subject to an “external jurisdiction” that gives it legal authority: ‘the title of a book allows us to classify it in a library, to attribute to it rights of authorship, as well as the trials and judgments which can follow’.¹⁸ But as is clear, the two jurisdictional zones posited here are in no sense stable – the external legal logic infects our understanding of the internal jurisdictional ordering and *vice versa*.

Following Derrida’s identification of a doubled legal logic at work both within and without the text, we can read “Before the Law” as a performance and narration of a jurisdictional encounter. A complex internal jurisdictional ordering is set in motion in conjunction with a presupposition of an external jurisdictional ordering that hopes to guarantee the legitimacy of the text itself. It is at this level that there appears to be a quiet complicit between law and literature: the literary “internal jurisdiction” of Kafka’s tale has a constitutive relationship with the legal “external jurisdiction”. The identification of this ordering, however, does not address the question of the “law” that precedes such jurisdictional presumptions and it is to this that we should now turn.

2.2.2 The Law before the law

Derrida sees the conditions of possibility of the law (the question of what comes before the law) as revealing itself by attending to the law’s relation to literature. The law and literature, for Derrida, share the same conditions of possibility; both share a kind of non-origin, an “origin” that resists being determined, located or contained. The lawfulness of law (the law of the law) and the literariness of literature are both conditioned by a certain

¹⁷ Ibid., 189.

¹⁸ Ibid., 189.

aporia or undecidability that both Kafka's tale of the man from the country and Freud's myth of the foundation of the moral law in *Totem and Taboo*, show. I want to stress *showing* here because it is precisely in what these two "literary texts" *show* rather than *tell* that, I think, is crucial for Derrida.¹⁹ Both stories in Derrida's reading are strange non-events, they are relations or stories where nothing really happens. The murder of the primordial father in Freud's fable of the origin of the law is only effective because of the guilt that the sons feel. The supposed founding event of the law, then, must depend on a prior moral law that enables the sons to feel guilt and remorse. Furthermore, in the institution of the prohibition of murder and incest, the very things that the sons desire before the murder, the father's power over the community is maintained from beyond the grave. The father's death, in fact, changes nothing. Derrida suggests that this is a tale that tells of 'an event without event, pure event where nothing happens'.²⁰ Kafka's tale of the man who seeks admittance to the Law, similarly tells of a manifest failure. Just like Freud in his attempt to find the origin of the law, the man from the country is unable to reach the Law, he cannot even come close, he is stymied by the first of what we are told are many doorkeepers. What both Freud and Kafka show is the impossibility of access to the origin of the law and in so doing both reveal a certain space "before," or prior to, the law as the law's condition of possibility. This failure to tell of the access to the law itself is conditioned by *différance*, a perpetual play of difference and deferral. That the law cannot itself be approached or determined is the law of the law. As Derrida says:

What is deferred forever till death is entry into the law itself, which is nothing other than that which dictates the delay... What *must not* and *cannot* be approached is the origin of *différance*: it must not be presented or represented and above all not penetrated. That is the

¹⁹ I take this sense of "showing" rather than "telling" or "saying" from Ludwig Wittgenstein, *Tractatus Logico Philosophicus*, trans., C. K. Ogden (London: Routledge, 2005), 5.62: 'what solipsism *means* is quite correct, only it cannot be *said*, but it *shows* itself' and at 2.172 'the picture... cannot represent its form of representation; it shows it forth'. A not dissimilar distinction is made by Benjamin who describes his method in the *Arcade Project* as "literary montage;" he suggests that he 'needn't say anything, merely *show*'. See W. Benjamin, *The Arcades Project*, trans. H. Eiland (New York: Belknap Press, 2002), 1, n. 2. The notion that I want to pursue here is that a "sense" is revealed irrespective of that saying's content. To emphasise "showing" in the present context is to underscore the extent to which both Kafka and Freud reveal a sense of the origin of the law without being able to render that origin into a definable or presentable formula. Echoing Fitzpatrick's discussion of Freud's "productive failure" to locate the origin of the law in *Totem and Taboo*, we might suggest that Freud's failing to "tell" the origin of the law nonetheless allows him to "show" such an (non)origin.

²⁰ Derrida, "Before the Law," 199.

law of the law, the process of a law of whose subject we can never say, "There it is," "it is here or there."²¹

Freud's text in particular is driven by a desire to narrate the origins of the law but this narration itself annuls or interrupts the myth of the law's origin. We are left with nothing but this non-event where no origin is revealed.

But it is precisely in this relation of a "non-event" that something is shown. That which instigates Freud's failure to tell us of the origin of the law is also the very condition of the man from the country who is held in check at the Law's outer-most threshold. Both texts describe a certain aporetic experience of being before the law. And this is the very same condition of being before a literary text. Let us dwell for a moment longer on the connection that Derrida suggests between the law and literature. It is the literariness of these two texts that enables them to *show* the impossibility of accessing the law's origin or condition of possibility. The literary text holds us in a certain state of non-knowing, of undecidability or aporia between readability and unreadability²² and this condition is precisely the condition of being before the law. In Kafka's tale, the Law (*das Gesetz*) is unknown, it is rendered in the neuter gender and so cannot even be given a feminine or masculine identity. As Derrida says, 'we neither know *who* nor *what* is the law'. And it is in this space of non-knowing, Derrida suggests, 'is, perhaps, where literature begins'.²³ Literature becomes, in a sense, a witness to the law's non-origin: it is able to *show* the law's *différance*. Literature performs the deferral that Kafka's tale relates, the potency of literature is located in the fact that it depends on this very deferral for its efficacy. Our encounter with literature must take place between the readable and unreadable, the translatable and untranslatable, the knowable and unknowable: literature holds us at the threshold of these two poles. Significantly, the play between these poles is constitutive of the medium itself. The literariness of literature is revealed in its ability to resist becoming totally transparent, knowable or readable, its very "essence" is in its ability to escape any crude essentialism. This fact endows literature with privileged capacities to precisely *show*, in its resistance to final determination, that which makes the law, the law. And it is precisely this resistance to any final determination that is the law of the law and the law of literature.

²¹ Ibid., 205.

²² Ibid., 196.

²³ Ibid., 207

The Law, in Kafka's tale, is itself silent and unknowable. As Derrida ponders, is the Law 'a thing, a person, a discourse, a voice, a document, or simply a nothing that incessantly defers access to itself, thus forbidding *itself* in order to thereby become something or someone?'²⁴ For our purposes, the silence of the Law is revealing. If, as we suggested earlier, "Before the Law" both narrates and performs a jurisdictional encounter, it is a strange kind of jurisdiction because it is a jurisdiction without voice. Of course, the countryman's abeyance at the gate is maintained by the doorkeeper's injunction to refrain from entry "at the moment" but this is a voice of the Law's representative not the Law itself. This silence at the heart of the law – the law of the law as silent – is key to understanding how we might tease apart the *juris* and the *diction* of jurisdiction. The law of the law, in Derrida's reading does not speak, it does not announce itself, rather it *shows* itself in its resistance to being announced or determined. It is this silent "law" that precedes the law's announcement that Derrida identifies. This silence, however, is not some pure outside that cannot be accessed but as the law's very condition of possibility shows itself in the announcement of the law. As Derrida suggests in "The Force of Law":

There is here a silence walled up in the violence of the founding act; walled up, walled in because this silence is not exterior to language. Here is the sense in which I would be tempted to interpret... what Montaigne and Pascal call the *mystical foundation of authority*.²⁵

It is this silence walled up within the violence of the law itself that Derrida suggests is that which precedes the law as its condition of possibility. But, as should be clear, precedence here cannot be thought of as temporal: this silent "law" that exceeds the announcement of jurisdiction will show itself in the announcement itself. Such a law would immediately efface itself if it were located or determined. Derrida, then, points to a plane of difference and deferral that lies before the law as the law's condition of possibility. This *différance* is the condition of possibility for the law and for literature but itself (as the law of the law) cannot be said, rather it shows itself.

In Hélène Cixous's reading of the Kafka tale, she suggests that the law's secret is that it is nothing. The law hides the fact that there is nothing to hide:

The secret of the law is that it has no material inside. The text is diabolical and puts down the law of the reader. One cannot contest that one is before the law, even if one does not know it.

²⁴ Ibid., 208

²⁵ Derrida, "Force of Law," 242

The law cannot be defined... [it] defends its own secret, which is that it does not exist. It exists but only through its name.²⁶

Cixous suggests that the force of law is maintained by its very absence and that the power of Kafka's story is to reveal this nothingness or emptiness at the heart of the law. Derrida's reading suggests something different. At the heart of the law (the Law of the law) there is not an absolute absence or negation, rather there is a negative that is itself constitutive of the law, there is a *différance* that shows itself in the positing of law or right. This law "before" the law is not and cannot be presented or delimited but is far from being a pure absence or a nothingness. We can turn to Nancy's evocation of being in "abandonment" to flesh out this suggestion. As already noted, to be abandoned is to be excluded from a jurisdiction but still, tacitly perhaps, subject to the law. For Nancy "abandonment" infers more than a troubling of the inside/outside; it is the *sine qua non* of existence. Assuming an ontological register of which Derrida would undoubtedly have been suspicious, Nancy asserts that being is, before all else, in abandon: 'the ontology that summons us will be an ontology in which abandonment remains the sole predicament of being'.²⁷ As is explored more thoroughly in the chapters that follow, for Nancy, "being" is always "being-with." He maintains an ontology in which others (and otherness more generally) are necessarily implicated in any claim "to be". Being is a matter of being-singular-plural whereby singularity is only revealed through a co-implication of self and other. Crucially this relationality with others cannot be presented or determined, rather it will always escape or withdraw. Echoing the discussion above concerning *showing* and *saying*, Pryor suggests that abandonment is revealed in the gap between the ontic and the ontological, arguing that, 'in the difference between Being and being, between what appears and what gives itself to appearance, as it were, what is – *whatever shows itself* such and such – is in abandonment'.²⁸ In this sense, abandonment refers to the fact that being will never be present as such but will only show itself in its withdrawal or exposure to otherness. To "be" is to be abandoned to others or, more simply, to be is to "be-with" in such a way that cannot be presented. Crucially for the current suggestion, Nancy asserts that 'one always abandons *to a law*'.²⁹ The law here should, like abandonment, be understood ontologically: we are abandoned to

²⁶ Hélène Cixous, *Readings: The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva* (Minneapolis: University of Minnesota Press, 1991), 18

²⁷ Jean-Luc Nancy, *A Finite Thinking* trans., Simon Sparks (Stanford: Stanford University Press, 2003), 36.

²⁸ Benjamin Pryor, "Law in Abandon: Jean-Luc Nancy and the Critical Study of Law." In *Law and Critique* 15(3) (2004), 283, emphasis added.

²⁹ *Ibid.*, 44, emphasis added.

“a law of being singular plural” that is beyond our control and that will have pre-existed our being thrown into the world. As Nancy suggests:

Turned over to the absolute of the law, the banished one is thereby abandoned completely outside its jurisdiction... the law of abandonment is the other of the law, which constitutes the law. Abandon being finds itself... remitted, entrusted, or thrown to this law that constitutes the law... Abandonment respects the law; it cannot do otherwise.³⁰

There is a “law” in such a reading that precedes and is the condition of possibility of the juridical law. This law, for Nancy, is an ontological assertion of abandonment in which one is always already cast outside oneself and exposed to others. This other law that precedes the law is revealed through a withdrawal of fixity or determinacy. In Nancy’s formulation we are not abandoned to a particular place or space, rather there is abandonment. And this is the law.

Let me, then, draw out two tentative and temporary consequences from this discussion of Derrida and Kafka which will be pursued in the two sections that follow. Firstly, the jurisdictional orderings implicit in Derrida’s reading of *Vor dem Gesetz* trouble a present and stable delimitation of the legal limit. Derrida illustrates a contamination at the law’s outer limit: that which is outside a particular jurisdictional order effects and infects the inside of a jurisdictional order. This leads to a broader point about how we theorise jurisdiction itself. The territorial definition of jurisdiction conceives jurisdiction as a visible line of demarcation between territorially integral spaces only captures part of jurisdiction’s efficacy. By underscoring the ways in which such a demarcation is not wholly effective (that is, the inside always already has effects outside) Derrida’s reading of *Vor dem Gesetz* invites us to re-think jurisdiction. Secondly, Derrida points to a silent, *différential* law at work before the law. This “law” is the condition of possibility for juridical law but only shows itself in the announcement of the legal limit itself. Strangely, this *différential* “origin” of the law is also the origin of literature. This is a provocative but somewhat abstract contention that deserves further elaboration. In an effort to pursue such an elaboration, I explore Derrida’s suggestion by tracing this silent or “other” law through some historical instances, significant for the construction of the common law in the sixteenth and seventeenth centuries.

³⁰ Ibid., 44

2.3 (De)constructions of the Common Law

Derrida's reading of "Before the Law" suggests, firstly, that law shares the same "non-originary origin" as literature and secondly, there is some "law" of difference and deferral before juridical law is pronounced. In this section I want to trace both of these assertions through the efforts made to strengthen the authority of the common law in England in the sixteenth and seventeenth centuries. The period 1550-1630 marks a point of transition from medieval legal orderings towards putatively modern conceptions of legality. With the rise of the modern nation state came a concomitant desire for centrally administered legal systems that guaranteed the normative homogeneity of political space. In England, it was the common law that emerged as the dominant legal force, supplanting or subsuming the plurality of jurisdictions typified by the medieval period. In an effort to expand on the complicity of the literary and the legal discussed above, this section inquires into how a fictional or poetic sense along with a particular narrative construction helped secure the dominance of the common law in this period.

Sir Edward Coke's seventeenth century *Institutes of the Laws of England* and his *Reports* chart the first steps in efforts to consolidate the laws of England and assert the dominance of the common law jurisdiction over revival claims to legal authority. Before Coke's *Reports*, which follow the style and rigour of Edmund Plowden's *Commentaries* (published between 1550 and the 1570s), the English law reports comprised of disorganised notes and sketches that were often of 'appallingly poor quality' containing anachronisms and erroneous authorial attributions.³¹ While the *Institutes* were of less practical use (Baker comments that Coke 'wrote like a helpful old wizard, anxious to pass on all his secrets before he died, but not quite sure where to begin or end')³² they cleared the ground for Sir Matthew Hale's efforts to formulate the first modern accounts of the common law.³³ Plowden, Coke, Hale and, much later, Blackstone chart a shift from the medieval to the modern and from a legal pluralism of overlapping and competing jurisdictions to a centralisation and standardisation of legal authority vested in the common law. Famously, for Coke this consolidation was achieved through an appeal to the ancient heritage of the common law

³¹ J. H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), 182.

³² *Ibid.*, 189.

³³ Hale's contributions were all published posthumously: *History of the Common Law* (1713); *Analysis of the Laws of England* and *History of the Pleas of the Crown* (1736); *Prerogatives of the King* (1776). As Baker comments Hale managed to 'organise and present... arcane material in thoughtful and analytic treatises'. See Baker, *An Introduction to English Legal History*, 190.

and to the “artificial reason” of the judiciary. Briefly, I want to assess this relation of common law history, putting it in conversation with Derrida’s contention of a co-appearance of the law and the literary discussed above.

2.3.1 Mythologies of the common law

Crucial to the common law’s claim to authority is its supposed antiquity, traceable to a time before legal history, to ‘time out of mind’.³⁴ Coke and his contemporaries were concerned to present the common law as pre-dating not only the Norman Conquest but also the Roman invasion of Britain in the first century A.D. As Sir John Davies (writing in the mid-seventeenth century) claims, ‘the laws of any other kingdom in the world... [are not] so venerable for their antiquity’ as the common law of England.³⁵ One significant effect of this construction of the law as reaching into an ancient past is to posit legal authority as having a prerogative over and above that of the monarch. As Coke was keen to remind James I, it was Bracton – writing in the thirteenth century – who asserted that the King is under no man, but under God and the law.³⁶ Key for these common law advocates, then, was to present the common law as an authority beyond reproach, with a quasi-mystical justification that silences criticism or challenge to its authority *ab initio*. Goodrich suggests that such constructions are works of ‘common law theology’, arguing that by endowing the common law with a divine status, early modern thinkers sought to guarantee the ‘infallibility and unquestionable authority of an indigenous English law’.³⁷ Even a cursory glance at English history would suggest that this was always going to be difficult.

Such difficulties come into particular focus in the attempts made to explain away the fact of the Norman Conquest of England. Clearly, the favoured narrative of the existence of a

³⁴ Edward Coke, *The Second Part of the Reports of Sir Edward Coke* (1826), xi-xii. Quoted in Shaunnagh Dorsett, “Native Title,” 37. The notion of “time out of mind” has two meanings. Firstly, it evokes an ancient and quasi-mystical heritage stretching back to beyond the Roman invasion of Britain. Secondly, it is a legal term of art that classifies the status of the *lex non scripta* of the common law. Matthew Hale suggests that statutes made ‘before the Time of Memory’ are considered part of the unwritten rules of the common law. For Hale, ‘Time within Memory’ begins with the reign of Richard I, i.e. 6 July 1189. See M. Hale, *The History of the Common Law of England* (Chicago: University of Chicago Press, 1971), 3-4.

³⁵ Quoted in Peter Goodrich, “Eating Law: Commons Common Land, Common Law” *Journal of Legal History* 12 (1991), 259.

³⁶ Edward Coke, *Prohibitions del Roy* 12 Co Rep, 65, quoted in Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory*, 2nd ed. (Sydney: Lawbook, 2002), 45.

³⁷ Peter Goodrich, “Critical Legal Studies in England: Prospective Histories,” *Oxford Journal of Legal Studies*, 12(2) (1992), 205-206.

common law of England stretching to time immemorial, is abruptly challenged by the fact of William Duke of Normandy's seizure of the English throne in 1066. The 'great catastrophe' of the Norman Conquest,³⁸ irrespective of the substantive changes to the English legal system (which, arguably, were slight) presents the common law narrative with a grave difficulty. Pocock puts the problem in the following terms:

If Duke William, even for a single instant, had been absolute ruler – if he had been king by *jus conquestus* – then it did not matter if he had maintained English law instead of introducing French, and it did not matter what charters and grants of liberties he had subsequently made... all that had been done... by virtue of his unfettered will, on which his grants depended and on which... the laws and liberties of England for ever afterwards must depend likewise.³⁹

Early modern legal luminaries like Coke and Davies set out to disavow the Norman influence on the English common law in effort to cling on to their narrative of an unbroken lineage of authority. One seemingly insurmountable challenge was the presence of the French language in the common law's lexicon. Following the conquest a linguistic shift occurred away from a predominance of Latin to French. This, in turn, gave rise to a unique legal dialect known as "law French" being used in English courts. A hybrid of Norman French, (Parisian) French and English, law French was initially used orally but later confined to a written form. Cases were reported in law French until the end of the sixteenth century.⁴⁰ As himself a legal reporter, Coke was undoubtedly acutely aware of this threat to the narrative of English legal history that he was instrumental in establishing. Writing in the fifteenth century, Sir John Fortescue explicitly linked the existence of law French to the Norman conquest.⁴¹ In a wonderfully inventive turn Coke ignores Fortescue's – seemingly obvious – account of the heritage of law French and locates the emergence of the dialect in the Plantagenet claims to France in the fourteenth century. Somewhat brazenly, Coke recasts the mark left by the Norman invasion and conquest of England to be assertions of English claims over land in France. Coke suggests that the law reports were penned in French, rather than English ('the vulgar tongue') because, owing to Edward III's claim to lands in

³⁸ F. W. Maitland and F. C. Montague, *A Sketch of English History* (Clark: The Lawbook Exchange, 2010), 3.

³⁹ J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, 1957), 53.

⁴⁰ See, F. W. Maitland and F. C. Montague, *A Sketch of English History* (2010), 32-39 and B. Cormack, *A Power to do Justice* (2007), 177-223.

⁴¹ Sir John Fortescue, *De laudibus legum Anglie*, ed. and trans., S. B. Chrimes (Cambridge: Cambridge University Press, 1942), 114-117 quoted in B. Cormack, *A Power to Do Justice*, 185-186.

France, French represented a more widely understood idiom in which to record the law.⁴² As Cormack points out, Coke's reversal of the direction of the Anglo-French conquest reveals 'a struggle for control of a story or a structure... fundamental to national identity'.⁴³

The common law's jurisdiction is established and reiterated through a fashioning and figuration that silences and excludes the heterogeneity out of which it emerges. The erasure of the French influence on English law reveals a broader concern for the common law to define itself against continental legal forms.⁴⁴ Such a quest for a unitary legal order – coupled with the political centralisation of the period – produces a narrative that edits out the 'unholy mixture of Anglo-Saxon, Danish, Roman and French law' that provides the basis for the institution.⁴⁵ Crucial for our present concerns is the way in which this narrative was achieved. In charting the putative "origins" of the common law, Coke *et al* were engaged in a practice of artifice or figuration that evidences the co-appearance of the legal and the fictive for which Derrida argues. The common law narrative is one of an ancient purity, achieved through the crafting of legal history that posits various othernesses as its constitutive outside. As Derrida would be quick to remind us, such an outside cannot be fully excluded but rather haunts the inside, appearing in spectral forms, disturbing the binary that is supposedly erects. This jurisdictional technicity works to obscure the common law's inchoate foundations. We must approach the common law *as if* it had always been thus, *as if* it existed before the Norman Conquest, *as if* the mythology told by the early common law thinkers was the end of the matter.

This retrospective construction of the history of the common law that erases its plurality through an assertion of a legal history that is "time out of mind" reveals the centrality of

⁴² Cormack, *A Power to Do Justice*, 189. For an account of the emergence of law French and the early modern accounts to explain away its presence see Cormack, 182-199.

⁴³ *Ibid.*, 190.

⁴⁴ Peter Goodrich, "Critical Legal Studies in England: Prospective Histories," *Oxford Journal of Legal Studies*, 12(2) (1992), 202 – 204, *et passim*. Following a psychoanalytic approach, Goodrich's argues here that the exclusion of European and Roman legal heritage from the construction of the common law marks a decisive trauma in English legal history that has continuing effects. Following Freud's assessment that the traumatic event returns to haunt and disturb the psyche, Goodrich contends that the exclusion of critical voices in the common law narrative – often with evidenced by an interest in continental scholarly traditions – has returned in the form of Critical Legal Studies in Britain. For Goodrich, a critique of the common law is essential for the prospective efforts of the "BritCrit" movement, but so too does the history of the common law, with particular attention to its dissenting voices (Fraunce, Bentham *et al*) offer resources and a heritage for legal critique of the common law.

⁴⁵ Goodrich, "Critical Legal Studies in England: Prospective Histories," 217.

crafting and figuration for the common law jurisdiction. As Peter Goodrich has argued the exclusions and omissions evidenced in the construction of the common law remind us that 'fiction... image and myth have always been essential elements in the rhetorical armoury and identity of the institution'.⁴⁶ Coke, his contemporaries and followers develop a "history" of the common law is, in an important sense, an effacement of history. In evoking a history that traces its origins to "time out of mind," these early common law thinkers develop a sense of the law without "before" or "after". The law in this reading is always already existent but also always already open and ready to accommodate the singularity of every case that appears before it.⁴⁷ This is the supposed power of the common law but, as Derrida has noted, the effacement of any history or narrative is integral to the law's very logic:

The law, intolerant of its own history, intervenes as an absolutely emergent order, absolutely detached from any origin... To be invested with its categorical authority, the law must be without history, genesis, or any possible derivation. That would be the *law of the law*. Pure morality has no history as Kant seems to be the first to remind us, no intrinsic history.⁴⁸

The law in such a reading appears as both transcendent *and* immanent. The law can be traced to a time immemorial and is thus thought to have always existed. In the common law context, clearly this transcendentalism does not rely on a transcendental referent of any sort – the law is not referred back to a particular founding moment or declarative act – but the law is presented as always already extant. However, the law must be immanent to the particularities that come before it. It is, in fact, precisely the law's claim to transcendentalism that allows the law to appear as "absolutely emergent" and immanent to a particular situation. The law's effacement of its own history allows it to be always already presenting itself.⁴⁹

The constructions of the modern common law that we have – very briefly – observed, reveal a kind of non-originary origin that cannot be directly approached or entered. At bottom, we

⁴⁶ Ibid., 201.

⁴⁷ See J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, 1957), 36-37

⁴⁸ Derrida, "Before the Law," 194 and 191.

⁴⁹ The suggestion made here of a simultaneously immanent and transcendent inference within the law is shared (to a certain degree at least) by the "constitutive theory of law" pursued by Paul Kahn *et al*, see P. W. Kahn, *The Cultural Study of Law* (Chicago: Chicago University Press, 1999), 37-40, *et passim*. Benjamin Prior suggests that a helpful corrective to the constitutive hypothesis's positing of an autonomous sphere of social knowledge and action can be found in Nancy's work on community and the attendant logic of abandonment. See Benjamin Pryor, "Law in Abandon: Jean-Luc Nancy and the Critical Study of Law," *Law and Critique* (2004) 14: 259-285.

find figuration and artifice; an account of the origins of the common law that returns us to Derrida's concerns with the co-appearance of the legal and the literary discussed above. Like the man from the country, we are abandoned at the gates of the common law. We hover at the threshold, left only with a fictive narration of a history without historicity. Without a transcendent referent around which the law can orientate, the early modern account of the common law is produced through artifice and technicity and leaves us only with fictions. But, as Derrida notes in relation to Freud's foundation myth, such fictions are not without effects. It matters little if we believe the narrative of the common law that stretches to a time out of mind to be true, the force of the narrative is to give a particular shape and impression of the law, to *show* us something of the law, rather than to tell it straight. Coke and his fellows gives us the impression that the common law can claim an unbroken lineage, like the blood lines of an ancient family, to a time so distant it is otherworldly. By evoking such a narrative, Coke and others present the law as that which cannot be questioned or finally determined; as Derrida comments, the story of law is a story of prohibition that itself is a prohibited story.⁵⁰

This emphasis on fictionality and the work of crafting the law reveals a significant, and often overlooked, aspect to jurisdiction. The narrative that the early common law thinkers constructed was clearly a jurisdictional matter. The task was to establish the proper limits of legal authority and annul the medieval plurality of jurisdictions that immediately preceded the modern efforts to centralise and unify. Beyond the staking out of legal ground – either physically or conceptually – jurisdiction is also bound up with practices of narration and formation that craft the limits of legal authority. Jurisdiction, in this sense, should be properly understood as *technê*: a practice that produces something both artificial (rather than natural) and contingent (rather than necessary). Thinking of jurisdiction as a craft might provoke an analogy with a craftsman like a carpenter who fashions material into a practical and usable form.⁵¹ However, following Derrida's elision of literature and law, we

⁵⁰ Derrida, "Before the Law," 200.

⁵¹ Dorsett and McVeigh consider the technological implications of jurisdiction. As they suggest *technê* is concerned with knowledge or practice engaged in the production of something. For them, jurisdictional technologies include mapping, writing and precedent as well as procedural organisational matters. It is through these techniques that the law can take shape. The figure of the carpenter is associated with Lon Fuller, who suggests that certain moral and practical skills were necessary to fulfil one's duties as a lawyer. See Dorsett and McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012), 54-59 and Lon Fuller, *The Morality of Law* (New Haven: Yale University Press,

might favour an analogy with the storyteller or poet. Jurisdiction on such a reading would be a matter of giving form and shape to the law, both prospectively and historically, offering a narrative impression of legality, *showing* rather than strictly *telling* of the law's limits. In the efforts to consolidate the common law and guarantee its authority, a narrative was necessary. This narrative – as do all – excludes particular voices, images, tropes and concerns whilst privileging others. By attending to the art of this narrative form we can sense something of the contamination of the literary and the legal that Derrida identifies in his reading of Kafka: the origin of (the) literature (of the common law) at the same time as the origin of the (common) law.⁵² We return to the significance of fictionality for our thinking of jurisdiction in the final section of this chapter. Before returning to these concerns, and remaining within the historical mode, I want to assess Derrida's second assertion in "Before the Law," that of a "law" before the law.

2.3.2 Calvin's Case and the law before the law

The sixteenth century justifications for the common law's authority rest primarily on the claim that it expresses ancient customs and practices rather than monarchical dictates or esoteric conceptions of equity or justice. As Postema comments the common law theory of the early nineteenth century 'reasserted the medieval idea that law is not something made either by king, Parliament or judges, but rather is the expression of a deeper reality which is merely discovered and publicly declared by them'.⁵³ This notion gives rise to Blackstone's famous characterisation of judges as the "living oracles" of the law; the judge, on this reading, is a contingent and immanent mouthpiece for a transcendent, pre-existing juridical reality.⁵⁴ As we have noted, the construction of this 'deeper reality' was shaped by those that consolidated the common law and must be seen to be radically contingent, produced through a figuration that reflected the political – particularly nationalistic – concerns of the time. Nonetheless, the ready acceptance of a pre-legal "lawful" reality is key to the common law. Blackstone suggests that absurd or unjust law is not *bad law*, rather it is simply *not law*⁵⁵ because such pronouncements fail to attend to the underlying lawful order. The

1969), 96. In the present chapter I am interested in developing an account of jurisdictional *technê* closely tied with the work of *literary* crafting.

⁵² See, Derrida, "Before the Law," 199.

⁵³ Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1989), 3-4.

⁵⁴ William Blackstone, *Commentaries on the Laws of England* (London: T Cadell and W Davies, 1809), volume I, 68.

⁵⁵ *Ibid.*, 70.

question of the legal or quasi-legal obligations owed prior to formal legality comes into a sharpened focus in *Calvin's Case* (1608).⁵⁶ Five years after James VI of Scotland inherited the English Crown in 1603, this State-sponsored test case determined that Scottish subjects born after James's succession (the so-called *post-nati*) could inherit land in England. The question of that which comes before formal or positive legality is paramount for both the postmodern and early modern conception of the law. By attending to the court's reasoning in *Calvin's Case* we can assess the significance of the Derridian – and Nancean – assertion of the law before the law discussed above. I argue that a structural analogy can be drawn between the early modern and postmodern conceptions of law that, in turn, reveals a logic crucial to the legal crafting that jurisdiction achieves.

The claim before the court was initiated on behalf of Robert Calvin (or Colville),⁵⁷ a child born in Scotland after 1603. Calvin claimed that he had been forcefully disposed of land that he had lawfully inherited in Haggerston, Shoreditch. Those newly in possession of the land argued that Calvin's claim was inadmissible because, as an alien, he was bared from being a freeholder of land in England.⁵⁸ The case was of huge political significance, evidenced in part by the fact that Francis Bacon – the King's Solicitor General – argued the case on behalf of Calvin and the Crown. It was seen by James I as an opportunity to achieve, through the courts, a stronger union between the two kingdoms and thus secure the Stuart dynasty. Significantly, James had failed to achieve this endeavour by an Act of Parliament in 1607.⁵⁹ If Calvin were an alien and unable to inherit land in England it followed that James's Scottish subjects had no concomitant claim to English status. Alternatively, if the court found in favour of Calvin, Scottish subjects were – at least those born after James's succession – also to be considered subjects of the English Crown. In 1608, an "alien" was considered to be one born outside of England or, more accurately, one born outside the allegiance of the English

⁵⁶ (1608) 7 Co Rep 1a, 77 E.R. 377. I have found Polly Price's extensive assessment of the legal, political and historical issues at play in the decision particularly helpful. See Polly Price, "Natural Law and Birthright Citizenship in *Calvin's Case* (1608)," *Yale Journal for Law and the Humanities* 9 (1997), 73- 145. Price argues that the case – which laid the foundations for modern conceptions of birthright citizenship – is a foil which presents a series of wider considerations. For Price, the decision in *Calvin's Case* was produced by a confluence of natural law, feudal law and early modern conceptions of sovereignty, particular that of Jean Bodin the significance of which are still be felt today in contemporary debates – particularly in the United States – around (natural) citizenship, the status of "aliens" and the *jus soli* claim to birthright citizenship.

⁵⁷ See Polly Price, "Natural Law and Birthright Citizenship," 81 and B. Galloway, *The Union of England and Scotland, 1603-1608* (Edinburgh: John Donald, 1986), 148.

⁵⁸ *Calvin's Case* 77 E.R. 377, 378-379.

⁵⁹ Cormack, *A Power to Do Justice*, 243.

monarch and therefore owing allegiance to another.⁶⁰ It was accepted that the place of one's birth was not decisive on this question – those born at sea or in a colony could also owe allegiance to the Crown⁶¹ – so the case really turned on the meaning of “allegiance” at common law. If it could be shown that Calvin's allegiance to James VI of Scotland was homologous with allegiance to James I of England, then Calvin could not be considered an alien and the claim to his patch of Shoreditch would succeed. Beyond the prosaic nature of Calvin's particular difficulty lay serious political implications. If Scots were no longer aliens in England, the (partial) union of the two kingdoms⁶² had taken place when James took the throne.

The debate over the nature of allegiance has its roots in a more fundamental concern over the characterisation of the doctrine of the “King's Two Bodies”. The theory – detailed in Kantorowicz's seminal study⁶³ – posits a duality to the monarch's bodily form to account for the problem of the succession of sovereignty at the instant of the monarch's death. It was accepted that the monarch should be conceived, much like Christ who was both man and God, to have a biological body (the body natural) and a symbolic body (the body politic). On the death of the monarch, sovereignty is thought to subsist in the body politic guaranteeing no break in the chain of succession. The theory of the two bodies was significant because it seemed to work against the *post-nati* claim. Following Herbert Broom's account of the trial, Price suggests that a key plank in the defence's argument was that allegiance is owed not to the King's body natural but to his body politic.⁶⁴ As Price puts it, the defence argued that ‘the allegiance due to a King's subject... is several and divided between the two kingdoms... the allegiance due by Scots to James's Scottish body politic does not establish that Scots are subjects of the King of England’.⁶⁵ The argument suggests, then, that James had a tripartite bodily division: firstly a body politic for Scotland, secondly a body politic for England and thirdly a body natural, which happened to hold the two former offices. If allegiance was

⁶⁰ For a full discussion of the terminology used in the case see Price “Natural Law and Birthright Citizenship,” 86-89. See also Cormack *A Power to Do Justice*, 243.

⁶¹ See Price, “Natural Law and Birthright Citizenship,” 106.

⁶² Note that Scotland and England were not united as one kingdom until the Treaty of Union in 1707.

⁶³ Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957).

⁶⁴ Price follows the points set out in Herbert Broom, *Constitutional Law Viewed in Relation to Common Law* (London: W. Maxwell and Sons, 1885), 6-7. It should be noted here that much of the understanding of the arguments for and against the *post-nati* claim is deduced from the Parliamentary debates concerning the naturalisation of Scottish subjects in 1607.

⁶⁵ Price, “Natural Law and Birthright Citizenship,” 98

owed to the body politic alone then there was no difficulty in rejecting Calvin's claim.⁶⁶ In effect, the defence argued that Calvin's position rested on a category mistake: he failed to understand that his allegiance was to a symbolic body rather than a natural one. This interpretation of the division between the symbolic and biological lives of the King came with an additional, but not unrelated claim, that allegiance was fundamentally a legal matter not a natural one. Allegiance on such a reading 'proceeded from the laws of England and not the person of the king'.⁶⁷ In this sense, allegiance was a matter of positive law, emanating either from the legal obligations that subjects owed or to the obligation owed to the symbolic authority of the Crown.

Rejecting this characterisation, Coke argued that allegiance was not owed to the king's symbolic body but to his natural one and, furthermore, that allegiance was not a matter of positive law but of divine law or the laws of nature. For Coke, the allegiance owed by each subject to the monarch was a personal matter of fealty akin to the feudal obligations owed by vassals to a lord.⁶⁸ This position is supported by Coke's characterisation of the king's authority ultimately emanating from his bloodline rather than in the symbolic vestiges that are bestowed upon him: '[the King] holdeth the kingdom of England by birth right inherent, by descent from the blood Royal, whereupon succession doth attend'.⁶⁹ The body politic on this reading is only something appended to the body natural after the event of succession and from this moment the body politic becomes co-extensive with the body natural. For Coke it makes no sense to suggest that allegiance could be owed to the symbolic body alone; as Coke claims, 'the politic capacity is invisible and immortal, nay, the politic body hath no soul, for it is framed by the policy of man'.⁷⁰ The allegiance that subjects owe to the monarch then was to the person himself, an obligation guaranteed by the laws of nature. Allegiance is

⁶⁶ This reading of the doctrine of the two bodies rested on the civil law maxim of *cum duo jura concurrunt in una persona aequum est ac si essent in diversis* (when two rights meet in one person, it is the same as if they were in different persons). See Price, "Natural Law and Birthright Citizenship," 102- 105. Coke's reluctance to accept this principle might be ascribed – partially at least – to his avowed commitment to a "pure" and non-European heritage to the common law discussed above.

⁶⁷ Price, "Natural Law and Birthright Citizenship," 101.

⁶⁸ As Price discusses the feudal heritage of Coke's position is significant. Writing in 1605 Thomas Craig reached the same conclusion as Coke *et al* on the question of the *post-nati* claim but rather than basing his conclusions on natural law, argued that allegiance was owed because of the *jus feudale*, a body of secular law that governed lord-vassal relations throughout Europe. See Price, "Natural Law and Birthright Citizenship," 128-135.

⁶⁹ 77 Eng. Rep. 389.

⁷⁰ Edward Coke, *Reports*, VII, 10-10a, quoted in Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957), 15.

“before,” “after” and “beyond” positive law, constituted by the ‘ligaments that connect minds and souls to one another’,⁷¹ binding subjects to the sovereign. A community that comes together and appoints a sovereign leader owes allegiance to that leader quite apart from the proclamation of any formal laws or statute. In Douzinas’s formulation this originary sociability is an expression of ‘bare sovereignty,’ it is the ground that makes a political declaration possible.⁷² The originary social tie provides the conditions of possibility for a later declarative act and the instantiation of formal legality. It was through an appeal to this category of allegiance that the court justified the *post-nati* claim. As Cormack suggests, allegiance binds subjects to the State’s body but this body is ‘something other than the a body politic, since it is a body made up of radically personalized [*sic*] bodies’ that subsists independent of formal legality.⁷³ This matrix of personal connectivity is the juridical given – or a fact of “bare sovereignty” – that is the condition of possibility for positive law. In *Calvin’s Case*, then, allegiance is before the law but also that which is “walled up” within the law as a presupposition that silently shows itself in formal legality. That allegiance is at once “before,” “after” and “beyond” law is key because it mirrors Derrida’s characterisation of the law before the law as that which overflows or exceeds the law itself.

Following the reasoning in *Calvin’s Case* we can identify an equivalent structure in Coke and Derrida’s characterisation of the law before the law. In this regard we are following Goodrich’s contention that ‘the premodern is postmodern [and] the medieval is contemporary’.⁷⁴ Whereas the early modern assertion of quasi-legality before the law rests on the category of “allegiance” and is a matter of natural law, Derrida’s postmodern assessment of that which precedes the law offers no such stable ground. For Derrida, the before of the law cannot be approached or confined because in the end it is *différance*, a poetic or literary differing and deferral that is the condition of possibility for the law. Certain similarities between the early modern and postmodern, however, do remain. Allegiance names a social bond that precedes and exceeds the obligations guaranteed by positive law; Derrida makes a strikingly similar observation in *The Politics of Friendship*:

⁷¹ *A Complete Collection of State Trials*, ed. T. B. Howell (London: Longman, 1809-26), 2:614 quoted in Cormack, *A Power to Do Justice* (2008), 246.

⁷² Douzinas, “The Metaphysics of Jurisdiction” in *Jurisprudence of Jurisdiction* (2007).

⁷³ Cormack, *A Power to Do Justice* (2008), 246.

⁷⁴ Goodrich, “Visive powers: Colours, Trees and Genres of Jurisdiction,” *Law and Humanities* 2 (2008), 227.

We are caught up, one and another, in a sort of heteronomic and dissymmetrical curving of social space – more precisely, a curving of the relation to the other: prior to all organised *socius*, all *politeia*, all determined “government,” *before* all “law”. Prior to and before all law, in Kafka’s sense of being “before the law”. Let’s get this right: prior to all *determined* law, *qua* natural law or positive law, but not law *in general*. For the heteronomic and dissymmetrical curving of a law of originary sociability is also a law, perhaps the very essence of law.⁷⁵

Clearly, Coke would balk at such a suggestion. For him the law of originary sociability resides in feudal orderings of a supposedly divine origin. However, an analogous structure between the early modern and postmodern positions is clear: a “law” of originary sociability must precede and exceed positive or formal law, following Derrida we might contend that this originary sociability is the “very essence of the law”.

What, then, of the relation between positive law and the law that precedes it? In *Calvin’s Case* the issue in question concerned precisely this question, the court was concerned with trying to navigate a path between extant formal law and the law before the law. In “The Force of Law” Derrida offers us an intriguing characterisation that returns us to questions of fashioning and *technê* discussed above. Here, discussing the relation between justice (which for Derrida is incalculable) and the law (which is calculable), Derrida asserts that one *must* ‘(*il faut*) negotiate the relation between the calculable and the incalculable’.⁷⁶ On the question of where this imperative *il faut* (“one must”) originates, Derrida suggests that ‘this *il faut* does not *properly* belong to either justice or to law... it only belongs to either realm by exceeding each one in the direction of the other’.⁷⁷ We might make a similar assertion with regard to the relation between the law before the law and positive law. The two exist in an aporetic double bind, both exceeding each other in the direction of the other. Such an aporia, however, cannot remain foreclosed. As Derrida indicates, we must negotiate and calculate. The law’s imperative, it seems, is to fashion the law out of this aporetic encounter, craft a legality in the space between these two registers whilst not falling wholly into either. This task of legal fashioning is evidenced in Coke’s decision in *Calvin’s Case*: it is in this liminal encounter between the two registers of allegiance and positive law that the jurisdictional line between alien and non-alien is drawn. Jurisdiction is a technique – in the

⁷⁵ Jacques Derrida, *The Politics of Friendship* (London: Verso, 2005), 231.

⁷⁶ Jacques Derrida, “The force of law: The Mystical Foundation of Authority,” in *Acts of religion*, ed. Gil Anidjar, (London: Routledge, 2010), 257.

⁷⁷ Ibid.

sense of an art or practice – that fashions law from the aporetic encounter between the law before the law and positive law.

2.4 Juris-fiction

As we have suggested, the constructions of the common law in the sixteenth and seventeenth centuries turns our attention to the *fictional* and *figurative* work in the formation of legality. Jurisdiction, thought as both the inauguration of the law and the ongoing reiteration of the legal limit, depends on a constitutive fictionality – an “as if” – that allows the law to appear devoid of any transcendent referent. As Hans Vaihinger – the early twentieth century philosopher who pursued the notion that all human systems of thought were comprised of fictions – comments: ‘*fictio* means, in the first place, an activity of *figere* that is to say of constructing, forming, giving shape’.⁷⁸ We have suggested that jurisdiction fulfils this function: it is the giving shape to law, the *technê* required to give the law a determinable form. This shaping and forming of the law takes place in an aporetic encounter between two legal registers: the positive law and the law before the law. Following Derrida’s insistence on the coincidence of the literary and the legal, as I have already suggested, this technicity might be best thought as being akin to the work of the poet or storyteller. I want to pursue this thought further through Nancy’s assertion that fiction lies at the root of jurisdiction, especially through his, rather playfully coined, notion of “juris-fiction.”

In *A Finite Thinking*, Nancy pursues the question of philosophy’s own juridical sense.⁷⁹ Nancy is concerned with the way in which a juridical discourse – which he characterises as being essentially Roman or Latinate – has become synonymous with philosophy. This inclination towards a juridical thinking of philosophy reaches its height in Kant’s “tribunal of reason” where, ‘philosophy becomes legalism, an entirely formal, formalist, and procedural discourse’.⁸⁰ In this move towards a philosophical legalism, where philosophy is conceived along strictly juridical lines, the question of the basis for philosophy’s authority is

⁷⁸ Hans Vaihinger, *The Philosophy of “As If”: A System of the Theoretical, Practical and Religious Fictions of Mankind*, trans. C. K. Ogden (Mansfield Centre: Martino, 2009), 81.

⁷⁹ Jean-Luc Nancy, *A Finite Thinking*, Simon Sparks ed. (Stanford: Stanford University Press, 2003), 152-171. Nancy makes it clear that he is not interested in the various ways in which philosophy has taken the juridical as one of its objects of study, rather the essay – *Lapsus Judicii* – assess the ways in which the juridical has infected the philosophical, whereby philosophy apes the juridical form.

⁸⁰ Nancy, *A Finite Thinking*, 153.

paramount. In this sense, Nancy enquires into philosophy's own jurisdiction. As is well known, Kantian critique is a foundationalist endeavour: *The Critique of Pure Reason* attempts to offer the secure conditions for the possibility of knowledge. Philosophy's jurisdiction over knowledge, in the Kantian formulation, would be grounded on fundamental and immutable principles. Nancy, focusing on the notion of jurisdiction, pursues an anti-foundationalist critique of Kant. He suggests that the quasi-juridical foundations of philosophy are themselves no more than fictions; for Nancy 'juris-diction is or makes up juris-fiction'.⁸¹

As we suggested above, jurisdiction works to give shape to legality between the registers of formal and informal law. Crucial for Nancy's assertion of the constitutive fictionality of jurisdiction is the notion of "the case." The law is crafted through and in relation to each case and for Nancy this reveals a contingency in the claim made by law (or philosophy) to have a secure foundation. The judge – who holds the office of jurisdiction and is invested with the authority to speak the law – pronounces the law in relation to each contingent case. "Case" here has its root in *casus* meaning the fall through chance, accident or contingency.⁸² The law is spoken and established through the contingency of the case and thus depends on a radical indeterminacy. As Nancy suggests, 'the persona of the judge and his *edictum* [judgement] are forged by the same *fictitious* gesture: right is said here of the case for which there can be no prior right'.⁸³ The (contingent and constructed) case is the vehicle through which the law announces itself. The law, if it speaks through the contingency of the case, must itself be equally contingent. This insight underscores a fundamental juridical logic: the judgment, and by extension the law, is only required when there can be no determination of fact. A case is heard and judgment given because it is unforeseen and represents a novel contingency. There is a 'creative reaching out to a possibility beyond [the law's] determinate existence'⁸⁴ that in being folded back into the interiority of the law creates the norm. There is, then, an essential need for technicity and figuration in the encounter with each case.

⁸¹ Ibid., 157

⁸² Ibid., 155

⁸³ Ibid., 157.

⁸⁴ Peter Fitzpatrick, "Juris-fiction: Literature and the Law of the Law" *Ariel: A Review of International English Literature* 35(1-2) (2004), 221.

This insistence on fictionality in the law's operation is redoubled in the suggestion that the sovereign person who announces the law (and *persona* means "mask") does so through artifice and theatre and significantly on the basis of a constitutive fiction: *as if* the speaker has authority to declare the law. Nancy argues:

This (juridical) person, this persona is still one who formulates... the mask, *personat*, it amplifies the voice [of the law] and lets it be heard from afar... This power itself is artificial and theatrical: (the subject of) right is established – or stated – on a nothingness of being and nature.⁸⁵

The proclamation of law relies on a "fiction" of authority, a crafting and technicity that gives shape to its sovereign claim. By attending to the fictions and contingencies that are necessary for the construction of the law a further fiction is revealed. Taken in its literal sense, jurisdiction suggests that the law speaks. A speaking entity is presumed to have a mouth and bodily integrity and so the very notion of a law that speaks presupposes a particular construction of the law as having a singular essence. As Douzinas suggests, 'only a unique individual can speak the law... [and] it is because the law must have a mouth and a body that the great legislators – Moses, Solo, Lycurgus, Plato, Zarathustra – enter the stage'.⁸⁶ The law needs to co-opt the mouth of the legislator and through artifice and theatre appear as if it is the law itself that speaks. But, of course, the law has no face, no body, no mouth. In appearing as if it does, the law seems to have a oneness and an integrity that, in fact, is a figuration made possible by the happenstance of the persona who speaks on the law's behalf.

The central importance of "the case" reveals a groundlessness to any jurisdictional claim. This is particularly important for philosophy's critical endeavour to account for the secure conditions of possibility for knowledge. By attending to the fiction at the heart of philosophy's jurisdiction, Nancy reveals the non-foundation at its heart. At bottom – as we have already asserted vis-à-vis the common law – we are left only with fictions and the necessary work of fashioning meaning from the contingencies that befall us. Significantly, this fashioning itself is without foundation, rather it is guaranteed by artifice and theatre.

All of this infers a restlessness to jurisdictional *technê*. Jurisdictional fashioning does not produce something final or integral, the focus on the case reminds us that the law is a

⁸⁵ Nancy, *A Finite Thinking*, 155.

⁸⁶ Douzinas, "Metaphysics of Jurisdiction," 25

matter of ongoing narration, there is an ineluctable desire for plot and narrative form in the law. As we saw in our earlier discussions, the authority of the common law jurisdiction depended – in part at least – on the construction of a historical narrative that posited the law’s origins in “time out of mind.” The notion of “plotting” is perhaps particularly relevant to our current concerns. A “plot” carries a number of meanings: a small piece of measured land with a specific purpose; a representation of such space, as in a plan, chart or diagram of a building or area; the events that constitute the action of a narrative drama; or a furtive scheme designed to accomplish a particular end.⁸⁷ We can conceive jurisdiction’s “plotting” in all of these respects. Jurisdiction plots out legal space and lays claim to territory but jurisdiction too is the name given to the resulting representation of such space. In our discussions of the narrative ambition of Coke *et al* the latter two senses of plotting are also revealed, in their quest to guarantee the supremacy of the common law, a narrative was needed, a plot was hatched and a narrative (plot) created to serve its ends. For literary theorist Peter Brooks, plot is ‘the organising line and intention of narrative... best conceived as an activity, a structuring operation elicited in the reader trying to make sense of those meanings that develop only through textual and temporal succession’.⁸⁸ In this sense, plot is not given by the narrative but *constructed* by the reader in a constitutive relation with the text. Plotting, then, is itself fictional in the sense that it is a process of fashioning meanings and significances: plot turns happenstance and coincidence into a logical and recognisable form. The aspect to jurisdiction that I have charted in this chapter is aptly captured by the desire to plot and give shape to time, text and lawful life. Jurisdiction attempts to plot out a course for the law. But this plotting is without fixed foundation. As Brooks suggests, the plot is constructed by *the reader* of events, it is not presented *a priori*. The notion of juris-fiction developed by Nancy reminds us that the plot constructed by jurisdiction could be otherwise, it is itself but part of the law’s ongoing construction.

Jurisdiction names the artifice required to fashion a convincing and expedient narrative from a contingent set of circumstances and practices. The contingent act of creation in jurisdiction – particularly evidenced in the construction of the common law – makes jurisdiction a privileged category in examining the ‘legitimate fictions’⁸⁹ that law evokes to

⁸⁷ The Oxford English Dictionary.

⁸⁸ Peter Brooks, *Reading for the Plot: Design and Intention in Narrative* (Cambridge MA: Harvard University Press, 1984), 37.

⁸⁹ Montaigne, *Essays II*, 12 quoted in Derrida, “Before the Law” (2009), 183.

guarantee its authority. Significantly, too, jurisdiction so conceived openly admits that the law is shaped by fictions and given voice through a creative processes of figuration and artifice. Juris-fiction opens the law from within. As Fitzpatrick suggests, to abjure the notion that the law has a fully determinate content and is produced through figurative and fictional practices calls for 'the responsive opening of that content to the possibility of being otherwise'.⁹⁰ In the move from jurisdiction to juris-fiction, a fragility to the law's limit appears but this, in turn, opens the law to the possibility of critical intervention and occupation. Juris-fiction calls for us to plot the law anew.

2.5 Conclusion

The journey from jurisdiction to juris-fiction shift registers in at least two senses. Firstly, juris-fiction privileges a relation between law and literature and underscores the creative work that the positing and consolidation of a jurisdiction requires. With the category of juris-fiction we shift emphasis from the calculating precision of the inscription of the legal limit to a literary, poetic and consequently less stable mode. This in itself is a threat to the law. The law endeavours to present its authority as the product of careful calculation and deduction, the law's limits appear to be inscribed as a result of logical inference and precise mapping. This side to jurisdiction's *technê* obscures another life to jurisdiction, its reliance on literary and narrative modes to craft legal authority. Secondly, juris-fiction privileges the technological over the ontological. An inquiry into the practices of juris-fiction is concerned less with what jurisdiction *is* and more with *how* jurisdiction goes about giving shape to the law. Such a shift away from ontology to technology embraces plurality and avoids the essentialist or overly abstracted; there are, as the saying goes, many ways to skin a cat. In this chapter I have charted one aspect of jurisdiction's work, that of literary crafting and "fictioning".

A further claim that the chapter makes concerns the space in which this fashioning takes place. Following the structural analogy identified between the early modern and postmodern conceptions of law, I argued that jurisdiction's *technê* takes place between two legal registers: the *différential* law before the law and the positive law. Following both Nancy and Derrida we can characterise this prior law as an unstable and shifting matrix of

⁹⁰ Fitzpatrick, "Juris-fiction: Literature and the Law of the Law" *Ariel: A Review of International English Literature* 35(1-2) (2004), 225.

(social) relations that cannot be fully determined or defined. In the early modern characterisation, this originary sociability was defined by reference to divine law and the category of allegiance. In both cases the work of jurisdiction takes place in the encounter between this register and the calculating and determinate imperative of the positive law. The encounter between these two legal registers is aporetic in nature, it blocks a route and denies a resolution. However, this encounter demands negotiation, we must – as Derrida reminds us – calculate with the incalculable. Juris-fiction might be the most apt term to capture this impossible task.

Chapter 3

JURISDICTION: PERFORMATIVITY AND RESPONSIBILITY

Nancy doesn't say much about "betting" ... yet I perceive him as a thinker of the bet and a player – or rather like a bettor, a desperate bettor, that is: he never stops stalking, committing, committing himself, and doing anything to calculate some *hyperbolic* odds with *exactitude* as well as exaggeration. He does this without any expectations, counting neither on the gains of some Pascalian "wager" nor on any salvation. (Jacques Derrida)¹

3.1 Introduction

In the previous chapter we assessed the way in which jurisdiction crafts a sense of legality through the use of narrative and fictional devices. Derrida's assessment of the co-appearance of the literary and the legal prompted a characterisation of jurisdiction as a creative and technological practice that gives shape to the law. Though not without its own force and efficacy, such jurisdictional *technê* was presented as being radically contingent and therefore open to intervention and disruption. In this chapter we explore a different aspect to – and bring a different set of deconstructive strategies and concepts to bear on – jurisdiction. Here the *coup de force* of a jurisdictional moment is assessed. In this chapter we pursue the notion that jurisdiction is a foundational moment, a declaration of law and authority that establishes a political and legal community. In this sense jurisdiction is the law's originary moment, the performative rupture that declares legal authority and gives voice to a particular community. As such, we might not only cast jurisdiction as 'the first question of law'² but also the originary legal speech act that declares that there is law at all. Thinking of jurisdiction in this mode prompts – at first blush – a number of questions and concerns: who speaks and thus founds the law? How and why does such a declaration have the efficacy to found the law? On whose behalf does such a declaration speak and whose voices might be obscured or ignored in this founding moment? It is through Derrida's understanding of the performative speech act and his short text on the American

¹ Jacques Derrida, *On Touching – Jean-Luc Nancy* (Stanford: Stanford University Press, 2005), 309.

² Dorsett and McVeigh, *Jurisdiction*, 5.

Declaration of Independence that I address some of these issues. However, the chapter also inquiries into an ethics and/or politics of responsibility that such a foundational moment might engender. Through Derrida's understanding of the performative utterance, I suggest that the foundational declaration is always calling for a response, counter-signature or (re)affirmation. The foundational speech act of jurisdiction, then, infers questions of responsibility. The task of assessing the nature of this responsibility is taken up in the latter parts of this chapter.

The chapter brings these theoretical preoccupations to bear on the founding declaration, made by the anti-Gaddafi movement in Libya in February 2011, that established the National Transitional Council for Libya (NTC). I turn to this event for two reasons. Firstly, this declaration is a means through which we can assess the theoretical claims developed in Derrida's reading of the performative. Secondly, and more importantly, this declarative act engendered responses from a number of leading continental intellectuals including Jean-Luc Nancy. It is in the name of "political responsibility" that Nancy makes his intervention in response to the situation in Libya. The declaration and the subsequent response it provoked are a privileged series of events through which we can assess the relationship between the declarative act that lays claim to found legal and political authority and the responsibility that such a claim might inspire.

In accounting for the "metaphysics of jurisdiction," Douzinas suggests that jurisdiction – in its foundational mode – elides two distinct speaking voices: the voice of the subject of enunciation and the voice of the subject of statement. Most clearly identified in constitution-making, jurisdiction confuses the voice of the authors of the constitution (the legislative or administrative body that writes the constitution itself) and the voice of some higher entity for, or on whose behalf, the declaration is made ("all men," "God" or "the people" of a particular nation). We can refer to the actual authors of the constitution as the subject of enunciation and the higher authority (God or the people) as the subject of statement. Douzinas argues that crucial to the structure of jurisdiction is a constitutive confusion between these two voices. In particular this manifests as a commingling of the universal and the particular: the *universal* "All men are born free and equal" of the French Declaration of the Rights of Man and Citizen are rights that are only applicable in the *particular*; that is, to

the French citizens to whom the declaration refers.³ This coming together of the universal and the particular, along with the simultaneously descriptive and performative utterance, is what produces jurisdiction's sort after effect. In unpicking the confusions and synecdoches that jurisdiction performs Douzinas underscores the aurality of jurisdiction. In attending to jurisdiction's acoustic effects, Douzinas counsels attentive listening: 'we must open our ears, prick up our ears, develop an active hearing when listening to the law'.⁴ A critical engagement with the law must involve an attempt to hear through 'the ear of the other and confront the community of the sovereign One and All with the plurality of many ears'.⁵ This chapter hopes to listen with the ear of the other, always with the purpose of interrupting the sovereign claim to unity and essentialism that declarative foundations so often reveal.

3.2 The Performative Speech Act and the Declarative Foundation

Speaking in 1976 at the University of Virginia in Charlottesville Derrida prefaced a lecture on Nietzsche with some remarks on The American Declaration of Independence. In this brief text – subsequently published in *Negotiations* (2002) as "Declarations of Independence" – Derrida assesses the status of "the people" as the sovereign guarantor of the constitution. Derrida asserts that the people is not only indeterminate and internally differentiated but also temporally deferred and so can never be presented as such. This clearly troubles the narrative, so beloved by constitutionalists, that State law is legitimated by the people's authority as *pouvoir constituant*. But Derrida is not exclusively concerned with disavowing the putative "foundations" of the state or state institutions. His reading, by excavating the conditions of possibility on which these "foundations" rest, seeks to displace the economy which keeps them in place. The timing of the text's presentation is significant. Not only is 1976 the bicentenary of the American Declaration of Independence but also comes only a year before Derrida's infamous, and extensive, rejoinder to (American analytic philosopher of language) John Searle's criticisms of Derrida's essay on J. L. Austin, "Signature Event Context".⁶ It is in the context of Derrida's engagement with speech act

³ Douzinas, "Metaphysics of Jurisdiction," 24

⁴ Ibid., 31.

⁵ Ibid.

⁶ Derrida's "Signature Event Context" was first presented in 1971 at a conference on the theme of "communication" and later published in *Marges de la Philosophie* (1972). The first English translation appeared in *Glyph* in 1977. In a second volume of *Glyph* from 1977 John R. Searle published a response to Derrida's essay entitled "Reiterating the Differences: A Reply to Derrida". Derrida countered Searle's salvo with a 70 page essay: "Limited Inc a b c...". Derrida's two essays are collected

theory that “Declarations” should be read.⁷ I want to put these concerns in conversation with aspects of *Spectres of Marx*, Derrida’s most explicitly politically text written fifteen years or so later. Here, Derrida returns to the performative utterance – a term coined by Austin – connecting it to his (Derrida’s) own deconstruction of metaphysics. Key to his thinking of the performative in *Spectres of Marx* is the notion of “conjunction” or “conjuring” and it is to this motif that we shall also attend.

In a reading of these three texts, then, I pursue two concerns. Firstly the inscription of the *à venir* into the performative utterance and, secondly, the effect of *conjunction* in the performative declarative act. Derrida maintains a strict distinction between the *à venir* (literally “the to come”) and the future: the former is unpredictable and unprogrammable, naming the unforeseen coming of the other; the latter is understood as a re-casting of the present, the projection of present thinking into a future that is nothing more than a “present-future”. In this sense, the *à venir* calls forth a certain impossibility and unknowability. The notion of “conjunction” is something that Derrida focuses on, and plays with, throughout *Spectres of Marx*. “Conjunction” invokes multiple senses but most significant for our current discussion is the sense in which the performative declaration *conjures* entities such as “the people” or “nation” that, because they are temporally ambiguous, have a ghostly or spectral form. The key issue that I pursue here is that Derrida’s reading of the American Declaration of Independence depends on understanding a wider concern with an underlying temporal logic. Both the *à venir* and “conjunction” work to displace an economy of time that is predicated on the presence of the speaking subject (whether collective or individual) and the presence of the law created by the subject’s enunciation in a jurisdictional moment. It is this concern to disrupt an economy of presence that is crucial to understanding the scope of responsibility that a founding moment might provoke.

in *Limited Inc*, ed. Gerald Graff (Evanston: Northwestern University Press, 1988). Searle declined to have his essay included in the collection.

⁷ In the most comprehensive assessment of “Declarations” Jacques de Ville pursues this same route, offering a close reading of this essay in relation to “Signature Event Context”. The reading I develop here differs from de Ville in at least two important respects: firstly, the emphasis on the temporal category of the *à venir* is absent from de Ville’s reading; and secondly, the relevance of *Spectres of Marx* and the notion of “conjunction” is not discussed. See Jacques de Ville, *Jacques Derrida: Law as Absolute Hospitality* (Abingdon: Routledge, 2011), 43-73.

3.2.1 The performative: Derrida reading Austin

J. L. Austin's *How To Do Things With Words* – posthumously reproducing a lecture series delivered in 1955 at Harvard – develops the notion of the performative utterance. Austin's deceptively simple assertion that utterances have effects beyond describing facts in the world has given rise to a wealth of literature. Most notably the development of Austin's notion of the performative utterance in relation to gender and performance studies.⁸ Whilst intriguing connections remains in the various ways in which the performative has been taken-up and re-worked, the fortunes of the concept of "performativity" is beyond the scope of the present chapter.⁹ Here we should limit ourselves to Derrida's reading of *How To Do Things With Words* before we bring this thinking to bear on the jurisdictional founding moment.

The performative utterance, by being spoken, *does* something, it performs something in its being spoken. In the first lecture of the series, Austin distinguishes the performative from the constative utterance, the latter being the paradigmatic utterance of analytic philosophy and science that makes truth claims about things in the world. Austin's examples of performatives include: "I do" in a marriage ceremony; "I name this ship Queen Elisabeth" when the bottle is smashed against the stern; "I bequeath my brother my watch" in a will; and "I bet you sixpence it will rain tomorrow."¹⁰ In all instances, the utterances cannot be assessed for validity – it makes no sense to say that these statements are "true" or "false" – rather Austin suggests that we can only assert the "felicity" or "infelicity" of such statements. The felicity of a statement depends on the context in which a statement is made, for a performative utterance to have its proper effect six criteria must be met: (i) there must be a certain convention surrounding the use of the words; (ii) the appropriate persons and circumstances must be present in a particular case; (iii) the procedure must be executed by

⁸ It is perhaps Judith Butler's work in this area that has gained most currency. Butler takes up the notion of performativity, suggesting (to put things crudely) that the construction of gender is achieved through a performance of a particular gender role. For Butler "performativity" refers both to the theatrical inference of the term and the Austinian notion discussed here. Through particular gestures and acts, a gender identity is performed much like an actor performs a role in a play, but so too does the performativity of gender suggest that gender is not some fact in the world that can be described in a constative statement but is achieved through a performativity that *has effects*. See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Abingdon: Routledge, 2008) and Judith Butler, *Bodies That Matter: On The Discursive Limits of Sex* (London: Routledge, 1993).

⁹ For an assessment of the performative in Derrida, Austin, Butler and performance studies see J. Hillis Miller, *For Derrida* (New York: Fordham University Press, 2009), 133-173.

¹⁰ J. L. Austin, *How to Do Things with Words*, 2nd Edition, ed. J. O. Urmson and Marina Sbisa (Oxford: Oxford University Press, 1980), 5.

all participants correctly and (iv) completely; (v) the intentions of the participants must be commensurate with the effect of the procedure; and (vi) the participants must act in accordance with these intentions.¹¹ The performative, for Austin, is tied to these conventions and infers a degree of seriousness on behalf of the speaker: an actor performing on stage, for example, nullifies the effectiveness of a performative because of its non-serious character.¹² As should be clear, the felicity of a performative is importantly connected to the *intentions* of the speaker.

Austin's key insight, and one to which Derrida subscribes, is that language has effects beyond the dissemination of truths or falsities: language performs and produces affects. Furthermore, Austin's theory of performative utterances suggests that meaning can be context-dependent: the felicity of a performative depends on the presence of certain circumstantial conditions. This suggests that meaning is not attached in an intractable or permanent way to a particular set of signs, marks or sounds. The meaning and effect of an Austinian performative depends on the context in which an utterance is made. In "Signature Event Context" Derrida argues, through the examination of what he calls the "iterability" of language, that this context-dependence is a constitutive feature of *all* utterances. For Derrida, iterability is the condition of possibility for all communication. We might define iterability as repetition in difference or, perhaps more accurately, the *possibility* of repetition in alterity. As Derrida suggests, iterability (probably) has its roots in '*itara*, *other* in Sanskrit and... ["Signature Event Context"] can be read as the working out of the logic that ties repetition to alterity'.¹³ Derrida suggests that the repetition in alterity of an utterance in the (necessarily) possible absence of the speaker or author of that utterance is what makes meaningful communication possible. If I repeat the same word twice, for example, the second iteration is necessarily altered by the first, so whilst the repetition of exactly the same word must be conditioned by repeatability in general, the repetition is also tied to difference for in being repeated the word is altered through the changed context in which it is situated. This possibility of both repeating and differing is, for Derrida, what makes communication possible; and this is iterability.

¹¹ Austin, *How to Do Things With Words*, 14-15.

¹² *Ibid.*, 22.

¹³ Derrida, *Limited Inc*, 7.

Derrida argues that in his examination of performatives Austin touches on the possibility of this fundamental structure but then dismisses its importance, suggesting that it falls outside the proper bounds of his study. Austin suggests that a performative will only have effect if the six conditions outlined above are met. Derrida argues that, though Austin acknowledges that there is a possibility that a performative might not conform to such a schema,¹⁴ Austin fails to see the radical consequences of this insight. Contra-Austin, Derrida argues that infelicity must be a (necessary) possibility of all performative utterances:

Austin's procedure is rather remarkable... it consists in recognizing that the possibility of the negative (in this case, of infelicities) is in fact a structural possibility, that a failure is an essential risk of the operations under consideration; then in a move which is almost *immediately simultaneous*, in the names of a kind of ideal regulation, it excludes that risk as accidental, exterior, one which teaches us nothing about linguistic phenomenon being considered.¹⁵

Derrida suggests that the risk that a performative is not felicitous must be structurally *integral* to the conditions of possibility for the felicitous speech act. Austin dismisses the infelicitous performative as an aberration, suggesting that the use of a performative in a non-serious way (such as in a play or as a joke) is '*parasitic* upon its normal usage'.¹⁶ Significantly Austin excludes this parasitic form of the performative from consideration. For Derrida that which Austin excludes is the key to understanding the conditions of possibility for any utterance, whether a performative or not. Derrida suggests that what Austin excludes as 'anomaly, exception [or] "non-serious citation" is precisely what reveals a 'general citationality – or rather, a general iterability – without which there could be no "successful" performative'.¹⁷ For Austin's operative distinction between the felicitous and the infelicitous to hold there must be a presupposition of a prior movement – or iterability – that makes such distinctions possible.

One of the key consequences of this reading is the privilege that is afforded to "context" and the process of "contextualisation" in the determination of meaning. Iterability infers that every utterance can be re-inscribed in a potentially infinite number of contexts. But for Derrida these contexts are devoid of any orientating centre. In this sense, Derrida radicalises Austin and rather than determining the strict criteria that properly contextualise

¹⁴ Austin, *How to Do Things With Words*, 19-19.

¹⁵ Derrida, *Limited Inc*, 15.

¹⁶ Austin, *How to Do Things With Words*, 22.

¹⁷ Derrida, *Limited Inc*, 17.

a performative, asserts that all contexts are themselves contingent. There are, Derrida maintains, 'only contexts without any centre or absolute anchoring'.¹⁸ This focus on context removes the dominance of intention in the production of meaning. Iterability forces us to construct a new schema where 'the category of intention will not disappear; it will have its place, but from that place it will no longer be able to govern the entire scene and system of utterance'.¹⁹ The context-dependent nature of the performative is maintained by Derrida but the sovereign power of intention is removed. This is perhaps most clearly illustrated in the following example:

*At the very moment "I" make a shopping list, I know... that it will only be a list if it implies my absence, if it already detaches itself from me in order to function beyond my "present" act and if it is utilizable at another time, in the absence of my being-present-now... in a moment, but one which is already the following moment, the absence of the now of writing.*²⁰

Communicable utterances (whether written or spoken) have a life outside that in which they were originally circumscribed. Intention is traditionally tied to a metaphysics of presence: intention is privileged because the meaning of a statement is generally thought to be connected to the *present* thoughts of a speaker or author. But, as Derrida's description of writing the shopping list illustrates, presence is always divided. The written mark, even in the very ("present") moment in which it is written, must be able to function in the *absence* of the author. Intention, though relevant, cannot be the centre point around which meaning orientates, rather, meaning is produced through a context that is without centre. It is, in fact, the absence of a centre and the absence of any present ground that is the condition of possibility for any meaningful communication at all.²¹ As will be clear, in the context of

¹⁸ Derrida, *Limited Inc*, 12

¹⁹ Ibid., 18.

²⁰ Ibid., *Limited Inc*, 49.

²¹ In a critique of Derrida's notion of performativity, Elena Loizidou suggests that Derrida remains bound within an intentional structure where the performative is only given effect through the presupposition of a present speaking subject. For Loizidou, it is Butler's notion of performativity that escapes this paradigm: in Butler there is no subject prior to the performative, rather it is the performative that itself creates the subject. Whilst Loizidou points to many important developments of the theory of performativity pursued by Butler – especially the extent to which Butler radicalises and expands Derrida's thinking, moving the performative beyond speech and writing to a performativity of the body – this point, it is submitted, misses the mark. Loizidou's reading fails to account for the significance of Derrida's insistence that the subject holds a de-centred, non-sovereign position because of the iterability of utterances. Furthermore, as we will discuss below, Derrida makes the very point attributed here to Butler, that the performative (declaration) is precisely what creates the (collective) subject in the American Declaration of Independence. In short, Loizidou fails to put Derrida's assessment of the performative in a wider context of Derrida's displacement of the metaphysics of presence that conditions Austin's text. See Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (Abingdon: Routledge, 2007), 30-42.

constitutionalism or in terms of broader questions of foundational or declarative acts in general, Derrida's insistence on the iterability of language suggests that the meaning of a performative declaration (that founds an institution or even the law itself) cannot be exclusively tied to the present intentions of the speakers who make the declaration. The meaning and effect of a declaration is not closed or unified but opens itself to a response. Every utterance conforms to this same logic: because of the necessarily open nature of every utterance, each utterance calls for a response *ad infinitum* that tries, in vain, to affirm the unity of each utterance.

Derrida's suggestion is that a close reading of Austin reveals the need to account for a "general citationality" or "general iterability" as the condition of possibility for all utterances. Austin dismisses this possibility because such an iterability undermines the sovereign intention of the present speaker of an utterance. If every utterance is made possible by a general possibility of iteration in infinite contexts then any absolute claim to the propriety of an utterance is meaningless. Derrida's reading of Austin is grounded on a disquiet with the temporal economy that Austin readily – perhaps unthinkingly – accepts. The *presence* of the speaking subject with her *present intention* is privileged over the absent, differed and deferred iterability that is the condition of possibility for such "presence." Clearly, this "presence" is compromised by the iterability that Derrida identifies; some purported "presence" can offer no absolute ground or centre for a context. Iterability leaves utterances anchored only in contexts without absolute grounding. Let us pursue the consequences of this reading a little further in relation to Derrida's reading of the American Declaration of Independence.

3.2.2 Declarations to come (*à venir*)

"Declarations of Independence" (hereafter "Declarations") turns on two questions that centre on law's foundational moment: 'who signs, and with what so-called proper name, the declarative act that founds an institution?'²² The signature is crucial for the efficacy of a performative – in Austin's terms – because it is this that guarantees the requisite intention and contextual schema are in place. Clearly, a forged signature or a signature offered by the wrong party will void the effect of a performative. Unlike the truth of a scientific (or

²² Derrida, "Declarations of Independence" in *Negotiations: Interviews and Interventions 1971-2001*, trans. Elizabeth Roudinesco (Stanford: Stanford University Press, 2002), 47.

constative) statement, the value and effect of a performative is bound up with the author and signer of that statement. The signature, then, is that which anchors the context of the performative and is, in a sense, the foundation of the founding act. The signature fulfils the same effect of guaranteeing the authority, unity and legitimacy of an utterance as the *presence* of a speaker does in the case of oral utterances.²³ The signature, then, identifies the “source” of an utterance. But Derrida argues that the signature is not immune from the logic of iterability that “Signature Event Context” develops. The signature’s effect lies in its iterability and therefore must imply the ‘actual or empirical nonpresence of the signer’.²⁴ The repeatability of a signature, the fact that the signature *must* be repeatable in order to function, disrupts the presence and authority of a “present” signature.

Turning to The American Declaration of Independence itself, this is signed by the representatives of the United States of America in General Congress; they sign, ‘*in the name and by the authority of the good people... of these united states*’.²⁵ The signature, however, bears a trace of some other name or collective. The “good people” must exist in the signature of the representatives; it is *in the name of the good people* that the representatives sign. This trace, the fact that the “good people” must in some sense inhabit the signature, presents a confusion. Derrida asks whether the declaration suggests that the good people are free (have freed themselves) and are now, by signing – or at least having others sign on their behalf – simply describing their freedom? Or is it that in the very act of signature their freedom is established? The former is a constative statement, a description of a state of affairs, whereas the latter is a performative act that ‘does what it says it does’. Derrida suggests, in keeping with his rejection of Austin’s strict categorization, that both are at work: ‘this obscurity, this undecidability between, let us say, a performative structure and a constative structure, is *required* to produce the sought-after effect’.²⁶

The signature is paradoxically both descriptive (of an already existing state of affairs) and performative (establishing a state of affairs). The sort-after effect of the declaration lies in the instability, or undecidability, between the performative and constative initiated by iterability. As Derrida strikingly puts it, before the representatives sign, “the people,”

²³ Austin, *How to Do Things with Words*, 60-61.

²⁴ Derrida, *Limited Inc*, 20.

²⁵ Derrida, “Declarations,” 49.

²⁶ *Ibid*.

Do *not* exist as an entity, the entity does not exist *before* this declaration, not *as such*. If it gives birth to itself, as free and independent subject, as possible signer, this can hold only in the act of the signature. The signature invents the signer.²⁷

This suggests that, though there may be a primary affirmation of an already existing unity and freedom, it is only in the act of signature that that existence and freedom can be said to exist as such. Derrida leaves us with an aporia: the representatives sign on behalf of the people but “the people” does not exist before the signature. The representatives can only be thought to represent something after the signature itself. Everything happens *ex post facto*. The authority of the people is conjured through a retroactive affirmation and so the people as guarantor of the constitution is caught in temporal flux. Like Derrida as he pens his shopping list, the people, at the moment they are supposedly present in the declaration, necessarily infer their radical absence; they are only able to persist as a spectral trace of a future affirmation. Derrida expresses a similar sentiment in his later work on democracy and sovereignty where he suggests that:

Before any sovereignty of the state, of the nation-state, of the monarch, or in democracy, of the people, ipseity names a principle of legitimate sovereignty, the accredited or recognized supremacy of a power or a force, a *kratos* or *cracy*.²⁸

Devant le mot, there is a certain originary affirmation of the sovereignty of the people that then persists as a trace in the later performative that claims to establish that sovereignty as such. The signature evokes a strange temporal play where we become aware of the existence of the capacity to sign – the capacity that gives the people the ability to nominate representatives capable of signing on their behalf – only ever retrospectively. This retroactivity, calls for a response, the unsigned primary affirmation of sovereign ipseity *devant le mot* (itself a “signature” of sorts) desires to be acknowledged by the other.

The primary affirmation of “we are the people and we are free to nominate representatives” is clearly *prior* to the signature that performs that affirmation and establishes it as such. This *prior* affirmation, however, is always *to come* – it can only be considered to be a primary affirmation if mediated through a secondary statement of a signature. But in order to have its desired effect, this future perfect, Derrida writes, ‘should not be declared,

²⁷ Ibid.

²⁸ Derrida, *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault (Stanford: Stanford University Press, 2005), 13.

mentioned, taken into account... it is as though it did not exist'.²⁹ The formal structure of the foundational event, necessarily (re)inscribing a primary affirmation, inscribes the "to-come" into fabric of that moment and thus displaces that moment's pure presence. The signature, as the performative *par excellence*, puts time out of joint, it creates, as J. Hillis Miller has put it, 'an absolute rupture between the present and the past... [it] inaugurates a future that Derrida calls a future anterior... an unpredictable *à-venir*'.³⁰ The signature, then, has a simultaneous forward and backward pull. Implicit in this understanding of the signature (that is, that it at once belies a trace and holds the potential of the *à venir*) is that it calls for a response. If the written sign is inscribed with a certain "to-come-ness" then it calls for us to come to it and affirm it. In short, the signature calls for a countersignature. Hillis Miller refers to this as a 'co-performative... [that validates] a performative command that comes from outside me' illustrating how the one performative engenders another.³¹ This requirement of the countersignature is inferred by the essential iterability of language. Iterability guarantees the necessary possibility of the radical absence of the author in an utterance and this necessary possibility means that the unity of every utterance must be affirmed by the other in an act of countersignature.³² This process, however, cannot stop at one countersignature. Each countersignature's unity must be affirmed and guaranteed by an other's countersignature and this process can run, as Derrida says of the countryman's interminable delay in Kafka's parable "Before the Law," until the end of (the) man.³³ In this sense, the countersignature is always to come and thus is an opening of the future itself. The iterability of the written or spoken sign that guarantees the necessary possibility of that sign's infinite re-inscription in infinite contexts also means that the countersignature that affirms the sign must open itself to infinite re-inscription in the same way.

This interminable chain of signification is acknowledged by Derrida in the final passages of "Declarations of Independence":

It is still "in the name of" that "the good people" of America call *themselves* and declare *themselves* independent at the moment at which they invent (for) themselves a signing identity. They sign in the name of the laws of nature and in the name of God. They *posit*... their institutional Laws on the foundation of natural laws and by the same "coup"... in the

²⁹ Derrida, "Declarations," 50.

³⁰ J. Hillis Miller, *For Derrida*, 152.

³¹ *Ibid.*, 153.

³² Geoffrey Bennington, *Jacques Derrida* (Chicago, Chicago University Press, 1993), 55-56

³³ Derrida, "Before the Law," 204.

name of God, creator of nature. He comes... to guarantee the rectitude of popular intentions...
He founds natural laws.³⁴

The representatives of the people of the United States sign in the name of the people but the people themselves claim the authority to sign *in the name* of natural laws and *in the name of* God. The representative's signature (or should we say countersignature) is made in the name of the people of the United States but the people themselves sign their claim to rights and freedom etcetera in the name of God, thus making their signature, in turn, a countersignature. We can begin to see the impact of Derrida's claim that 'there are only countersignatures in this process'³⁵. Every signature is signed, in the name of an other – the signature is made in the name of the people, in the case of the representatives, or in the name of God, in the case of the people. As every signature becomes countersignature, the proper names of "the people," "the representatives," "Jefferson" *et al* disappear. The name is no longer proper (from the Latin *proprius* "own") because the name belongs to an other, written in the name of an other. God, then, stands as the only proper name guaranteeing all the (counter)signatures that have been given in the process.

This chain of multiple representations, where countersignature is written onto countersignature, *ad infinitum*, all the way to God, echoes the infinite deferral implicit in Kafka's "Before the Law".³⁶ Who signs? A signer is possible, but not yet. The end of "Declarations of Independence" casts Jefferson as the countryman who, rather than wanting entrance to the law, desires to sign the law in his own name. These are difficulties that Jefferson had not expected, surely everyone can sign in their own name? Jefferson's desire to found the institution *in his own name*, is forever deferred because he is only capable of signing as a representative – he is, as Derrida writes, 'a representative of representatives who themselves represent *to infinity*, up to God, other representative instances'.³⁷ This infinite deferral speaks of desire itself because it is in the impossibility of a "to come" that we experience desire as such; in this sense the sexual inference of the "to come" should not be overlooked. As Derrida acknowledges in "Signature Event Context," 'desires and phantasms'³⁸ are clearly at stake in a signature, a proper name, or a copyright. The signature speaks of the desire to name, the desire to secure a source, to found in *my own name* an

³⁴ Ibid.

³⁵ Ibid.

³⁶ Franz Kafka, "Before the Law" in *The Complete Short Stories* (London: Vintage, 1999), 3-4.

³⁷ Derrida, "Declarations," 52.

³⁸ Derrida, *Limited Inc*, 36.

institution, but Derrida's understanding of the signature in "Declarations of Independence" also forecloses that possibility, leaving us only with the infinite deferral of the doorkeeper's "not yet."

As I have been suggesting, this desire to respond to the demand of the signature is tied to the structural conditions of possibility of the performative. Derrida's claim that 'there are only countersignatures in this process' rings true because of the disruptive force of iterability that structures the performative. The primary affirmation is an unwritten, unenunciated signature but a signature nonetheless. This "signature" can only be seen as such when a written signature is made. But this second signature cannot be fully present and so must be seen as a countersignature, the trace of the primary signature then lives through this countersignature and each countersignature calls, in turn, for another countersignature thus opening the signature to the *à venir*. The signature, then, belies the *à venir*: in the very moment of foundation there must be the potential of a "to come" that is not predictable or programmable but wholly other. Because of the persistence of a more primary affirmation, because of the necessary implication of a countersignature in the signature, because of the 'absolute rupture between past and present'³⁹ that the performative engenders, the institution belies the "to come" in its very moment of foundation.

One consequence of this analysis is that the supposed *presence* of the jurisdictional moment that founds the law and gives voice to a political community is a myth created by metaphysics. The founding moment is conditioned by a *prior* generalised movement of iterability that disrupts the sovereign intention of declaration's authors or signers. Rather than providing an anchor for a particular community, the jurisdictional declaration reveals the groundlessness to that community's claim. The foundation, however, is not without effects. There is a rent in temporal succession that is created by such a moment, one that opens the community or order that the foundation hopes to secure to an unpredictable future that calls for response and responsibility.

3.2.3 Conjuring the declaration

Let us turn back to the strange effect that the declarative speech act has; let us note the conjuring trick it performs. As Patrick Hannafin has noted, the author of the constitution –

³⁹ J. Hillis Miller, *For Derrida*, 152.

like the author of a novel – ‘endeavours to create an image of something that does not really exist’.⁴⁰ Be it “the people” or “the nation,” the performative act of declaration creates, as if by magic, an entity that does not exist before the declaration is made. In the American Declaration of Independence, “the people” is created as if it were a unified totality: “the people” that express their freedom from British colonial rule are conjured into being by this performative act. Conjunction here has multiple senses to which Derrida himself pays particular attention in *Spectres of Marx*.⁴¹ The word’s earliest known usage in English reflects its Latin etymology, *conjurare*, meaning to “swear together or make an oath” (*com-* “together” and *jurare* “to swear”). Conjunction might suggest conspiracy, magic and tricky. But, as the *Oxford English Dictionary* points out, it also means the ‘effecting of something supernatural by the invocation of a sacred name or by the use of some spell... the performance of magical art or sleight of hand’.⁴² Conjuring also summons a devil or spirit to appear to do one’s bidding. In *Spectres of Marx* Derrida summons the ghosts of Marx himself. The conjunction (or, conspiracy) *against* Marxism and Marxian dogma engenders a conjunction *of* Marxism, of a certain spirit of Marxism.⁴³ It is a ghostly Marxism that Derrida, the conjurer, himself creates. As Derrida says, the thing that this conjunction summons is, ‘neither living nor dead, present nor absent: it spectralizes’.⁴⁴ This ghostly impression of Marx does not submit to ontology but must be thought, in Derrida’s formulation, in terms of *hauntology*. Derrida calls this spectralizing work a ‘*performative* interpretation, that is, an interpretation that transforms the very thing that it interprets’ and, perhaps understating things somewhat, notes that this understanding of the performative is ‘unorthodox with regard to speech act theory’.⁴⁵ The conjuring trick that Derrida performs: summoning a ghostly impression of the spirit of Marx that is neither living nor dead, is a constitutive element of the Derridian performative. Derrida as conjurer: perhaps we have a sense here of why deconstruction might refer to a certain sense of the impossible.⁴⁶ The swearing of an oath, the promissory statement that calls for affirmation, conjures ghosts and spirits for which we are forced to account.

⁴⁰ Patrick Hanafin, “Constitutive Fiction: Postcolonial Constitutionalism in Ireland” *Penn State International Law Review*, 20 (2001), 343.

⁴¹ Jacques Derrida, *Spectres of Marx: The State of Debt and the Work of Mourning*, Trans., Peggy Kamuf (Oxford: Routledge, 1994), 62-63.

⁴² The Oxford English Dictionary.

⁴³ Derrida, *Spectres of Marx*, 62.

⁴⁴ *Ibid.*, 63.

⁴⁵ *Ibid.*, 63 (my emphasis).

⁴⁶ Nicholas Royle, “What is Deconstruction?” in *Deconstructions: A User’s Guide*, ed. Nicholas Royle (London: Palgrave, 2000), 11.

The first chapter of *Spectres of Marx* opens with the final passages of Act I, scene v of *Hamlet* where Hamlet forces Horatio and Marcellus to swear to remain silent about the apparition of the ghost of Hamlet's father to which they just borne witness. The status of their obligation as an *oath* – as something that is guaranteed by *swearing* – is crucial for Hamlet:

Hamlet: Never make known what you have seen tonight.

Horatio and Marcellus: My lord, we will not

Hamlet: Nay, but swear't

Horatio: In faith, my lord, not I

Marcellus: Nor I, my lord, in faith

Hamlet: Upon my sword

Marcellus: We have sworn, my lord, already.

Hamlet: Indeed, upon my sword, indeed

Ghost (crying from under the stage): Swear⁴⁷

The oath ('never to speak of this that you have seen') is read and they swear to keep their promise, they swear again before Hamlet dismisses them. Derrida let's the oath hang over *Spectres of Marx*, standing as a reminder of the very promise that Derrida's engagement with Marx intends to break. There is always a threat associated with speaking of the ghost but Derrida's injunction to the scholar of today is to let the ghost speak, to live with ghosts and to be just with that which is 'beyond the living present in general'.⁴⁸ In letting the ghost speak and in his refusal to be silent on the question of the ghost throughout *Spectres of Marx*, Derrida is breaking this oath of silence.

The conjuring performative that summons the ghost always wishes to remain silent about its conjuring: the ghost 'seeks an essentially blind submission to his secret'.⁴⁹ This enforced silence that the ghost demands – remember that it is the ghost, speaking from under the stage, who echoes Hamlet's demand to swear the oath of silence – is not dissociated from the work of mourning. Derrida reminds us that in unearthing ghosts and in accounting for them we are 'first of all, mourning' and throughout *Spectres of Marx* 'we will be speaking of nothing else'.⁵⁰ Mourning for Derrida is impossible work, it is the attempt to ontologise

⁴⁷ William Shakespeare, *The Tragedy of Hamlet* (Oxford: Oxford University Press, 1998). Act I, scene v, 149-157.

⁴⁸ Derrida, *Spectres of Marx*, xix

⁴⁹ Ibid., 8.

⁵⁰ Ibid., 9

remains, the impossible attempt to make present a lost object. The silence that accompanies the work of mourning is part of the logic of mourning – as Derrida comments in his introduction to Nicholas Abraham and Maria Torok’s celebrated work on the subject,⁵¹ the topographical structure of mourning is,

Disposed as to disguise and to hide: something, always a body in some way. But also to disguise the act of hiding... the crypt [that place Abraham and Torok identify as the mourned object’s location within the psyche] *hides as it holds*.⁵²

We are never too far away from an awareness of this structure of mourning in *Spectres of Marx*. As Derrida argues, the triumphalism of Fukuyama’s *The End of History* and the celebrations associated with the so-called “death” of Marxism in the early 1990s conform to what Freud assigned to:

The so-called triumphant phase of mourning work. The incantation repeats and ritualizes itself... Marx is dead, communism is dead, and along with it its hopes, its discourse, its theories, and its practices.⁵³

Derrida is constantly shaking Marx’s crypt, calling out the ghost of Marxism or summoning the ghosts of a certain promise within Marxism. Undoing the silencing work associated with mourning is essential to Derrida’s work here. I would add that deconstruction in general (if we can think of such a thing) is always bound up with the strange fact of mourning: deconstruction gives voice to traces and spectres, working through what gets left behind by people, utterances and institutions. Deconstruction is always disturbing the silence of that the crypt demands.⁵⁴

Derrida is all too aware of the demand that the ghost makes for silence but he is unwilling to kowtow to the threat that ghost makes. This demand for silence about the ghost is not absent from the American Declaration of Independence. As Derrida suggests, the logic that animates the declaration, that summons up an image of “the people,” instigated by the self-authorizing power of the signature, ‘should not be declared, taken into account... [it] is as

⁵¹ Nicholas Abraham and Maria Torok, *The Wolf Man’s Magic Word: A Cryptonymy* (Minneapolis: University of Minnesota Press, 1986).

⁵² Jacques Derrida, *Fors: The English Words of Nicolas Abraham and Maria Torok*. A Foreword to, Nicholas Abraham and Maria Torok, *The Wolf Man’s Magic Word: A Cryptonymy* (Minneapolis: University of Minnesota Press, 1986), xiv (my emphasis).

⁵³ Derrida, *Spectres of Marx*, 64.

⁵⁴ Derrida notes in his essay “The Time is Out of Joint” that ‘the question of mourning... is at the very heart of deconstruction’. See *Deconstruction is/in America: A new Sense of the Political*, (New York, New York University Press, 1995), 21.

though it did not exist'.⁵⁵ The American Declaration of Independence, structured by the logic of the *à venir*, makes a pledge or an oath and this oath conjures into being a ghostly apparition of "the people". But this fact must remain silent – the declarative act is structured by the *as if* that we cannot question: *as if* by declaring or writing a people become free, *as if* "the people" as a unified entity exists at all. This silencing of the ghost effect is partly what gives the foundation its "mystical" character: we are left thinking that the conjuration of the people is something that we cannot speak of and therefore about which must remain silent.⁵⁶ As an antidote to this thinking, deconstruction undoes the structures that create this silence and tries to give voice to that of which we are told we cannot speak.

The ghostly impression of "the people" feigns a unity that does not exist. Derrida's suggestion in "Declarations of Independence" is that "the people" that are summoned by the conjuring trick of the performative declaration are but traces of a more primary expression of freedom and independence. The declarative act hides this ghost – 'it hides as it holds'⁵⁷ – or, perhaps, we should say that the declarative act hides these ghosts (in the plural) of the people. It is after all, claims to unity and essentialism, that Derrida's *hauntology*, aims to undermine. What the declaration attempts to do is establish a unity of voice and purpose: *we, the representatives of the people of the United States, declare that these colonies are and ought to be free and independent*. But this gesture creates an essentialised "people" that does not exist. It is a "people" made up of infinite othernessess and a myriad of voices that do not speak in unison. An essentialised, unitary, singular "people" is the image that the declaration creates but as we have noted above, this fictional singularity can only come into existence through the work of countersignature. The swearing together that the Declaration evidences is what conjures the "people" into "existence." The countersignatures of the representatives sign the primary affirmation of "the people" and these signatures are guaranteed by further countersignatures, all the way up to God.⁵⁸ "The people" is thus both differed and deferred by the declarative act and as a unified object, therefore, is inaccessible as such. This returns us to some of the concerns of the previous chapter. Recalling Freud's

⁵⁵ Derrida, "Declarations," 50.

⁵⁶ Implicitly referring to the final proposition of *The Tractatus Logico-Philosophicus* – 'whereof one cannot speak, thereof one must be silent' – Derrida himself suggests: 'I take the use of the word *mystical* in a sense that I would venture to call rather Wittgensteinian', see Derrida, "Force of Law," 242. See, Ludwig Wittgenstein, *The Tractatus Logico-Philosophicus*, trans. Ogden (London: Routledge, 2005), 189.

⁵⁷ Derrida, *Fors*, xiv.

⁵⁸ Derrida, "Declarations," 51.

founding myth in *Totem and Taboo*, we might note that once the sons have killed the primordial father they swear to outlaw the crime they have just committed. This swearing of an oath (this *conjuring*) summons the ghost of the dead father and institutionalises his effect beyond the grave. Freud's fable associates the birth of law – the prohibition of murder and incest, the two interdictions of totemism – with the conjuring of a ghost. The sons swear together, making an oath not to murder or commit incest because of the guilt the ghost instils in them. The sons' oath conjures the ghost of their father in the same way as the representatives' oath conjures the ghost of "the people".

I want to turn now to assess how this analysis of the performative speech act can help unpick a recent founding declaration. This case study serves as a vehicle through which we can understand the nature and scope of the ethico-political responsibility that the founding jurisdictional moment provokes.

3.3 Conjuring the National Transitional Council for Libya

Opposition to the Gaddafi regime began to coalesce in early 2011, with February's protests in Benghazi providing the focal point for the movement. One key event was the demonstration organised to take place on 17 February. This date marks the anniversary of the demonstrations against the Danish cartoons of the Prophet which took place in 2006 and degenerated into riots in which ten demonstrators were killed by security forces and many more injured. Pre-emptive suppression of the protests in February by the Gaddafi regime escalated anti-Gaddafi sentiment.⁵⁹ The protests were most active in the east of the country but, unlike many Western media reports, Libyan sources at the International Crisis Group note that 'the online protest calls originated from Libyans abroad, in Switzerland and the United Kingdom'.⁶⁰ Inevitably, these calls for protest were inspired by the events in Egypt and Tunisia where popular demonstrations had toppled the regimes there.⁶¹

⁵⁹ See International Crisis Report, "Popular Protest in North Africa and the Middle East (V): Making Sense of Libya," page 8. Published, 6th June 2011, available online at <http://www.crisisgroup.org/en/regions/middle-east-north-africa/north-africa/libya.aspx>. Accessed online 21 May 2012.

⁶⁰ Ibid.

⁶¹ The Libyan uprising against Gadhafi differed significantly from the events in Tunisia and Egypt. As Alain Badiou has pointed out the mass occupations of public space by heterogeneous groups that were seen in Tunisia and Egypt were absent from the uprising in Libya. In Tunisia and Egypt no representatives of these movements emerged, rather they were – as Illan rua Wall suggests – expressions of an inoperative or un-worked constituent power, without centralised authority or designated leadership. Libya, in contrast very quickly saw the establishment of a rebel council that

These protests against the Gaddafi-led regime, which spread to Tripoli, were quickly suppressed by the Libyan military. Misrata was shelled by artillery and Benghazi was threatened with equally severe treatment. There was a consensus within the parliaments of most European countries that the threat to civilians posed by Gaddafi's forces was serious. In response to this threat, and the many reported civilian deaths attributed to violent suppression by Gaddafi's forces, the UN security council passed resolution 1970 (2011) and, after Gaddafi refused to comply with its demands, 1973 (2011). UNSCR 1973 (2011) establishes a "no-fly zone" over Libya which:

Authorizes Member States... to take all necessary measures... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.⁶²

Air strikes, led by NATO countries, were carried out in Libya supposedly in accordance with the powers laid out in UNSCR 1973 (2011).

On 27 February – remarkably only 10 days after the protests in Benghazi had erupted – an opposition council emerged describing itself as the 'face of the revolution' against Gaddafi.⁶³ Having posited (or fashioned) the face of the revolution, a mouth and voice were inferred which, in turn, gave rise to the possibility of a jurisdictional declaration. After a meeting in Al Bayda on 24 February, a formal founding statement was issued by the NTC on the 5 March. The group comprised academics, local politicians disaffected former government ministers and tribal leaders and was at its inception led by Abdul Jalil a former Gaddafi Justice Minister and Judge. The founding statement issued on 5 March established the roles of its members, set out the Council's objectives and called for the international community to protect the Libyan people against 'any further genocide and crimes against humanity

purported to represent the Libyan people. Weapons were circulated among the population with the resistance assumed a militarised stance quite distinct from largely peaceful uprisings elsewhere in North Africa. See, Alain Badiou, "Open Letter Reply to Jean-Luc Nancy's 'What the Arab Peoples Signify to Us'" (2011). <http://www.criticallegalthinking.com/?p=2899>. Accessed online 21 May 2012. And Illan rua Wall, "Tunisia and the Critical Legal Theory of Dissensus" *Law and Critique* (2012) 23: 219-236.

⁶² UN Security Council Resolution 1973 (2011) see <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm#Resolution>. Accessed online 21 May 2012.

⁶³ Reuters report: "Anti-Gadhafi Figures Form National Council: <http://www.reuters.com/article/2011/02/27/libya-council-revolution-idUSWEB194120110227> (2011) Accessed online May 2012.

without any direct military intervention on Libyan soil'.⁶⁴ The NTC handed its authority to govern Libya to a newly elected assembly on 8 August 2012, until this point the NTC held jurisdictional control over of the Libyan territory.

It is worth noting at this stage how the NTC legitimated its foundation. Part of what makes the foundation to authority, in Derrida's terms, "mystical" is the way in which the legitimacy of an institution is self-authorizing. The foundation of the legal order, for example, rests on nothing but laws themselves. As Derrida carefully argues in "The Force of Law," at its very founding moment the law is without law: incapable of judging the legitimacy of its founding acts. The law's foundation is an instance of non-law that transcends legality. Laws are not legal: their authority comes from an a-legal *coup de force*, neither legal nor illegal.⁶⁵ As we have seen in our discussion of Derrida's reading of the American Declaration of Independence, this performative act of foundation manages to conjure into being a State, people and laws that do not exist before the declarative act itself. The NTC's founding statement, however, differed in a striking regard from this tradition of the self-authorizing and self-legitimizing performative *coup de force* that founds the institution. Rather than claiming the authority to found itself from "the people of Libya" or from God, in the same way that the American Declaration derives its authority from the "good people of the United States," the NTC's legitimacy was, in a strange way, indebted to the Gaddafi regime. The Council's first Chairman, Abdul Jalil, was a former government minister and his authority to chair the NTC appeared to be derived from his former position of seniority in the Gaddafi regime. The old regime's complicity with the NTC goes further than this, the founding statement declares that:

All Libyan delegations to the UN, Arab League, International and regional organizations and members of all the Libyan embassies who joined the revolution are considered legitimate representatives of the Council.⁶⁶

The declaration went on to urge the current international representatives who had not yet defected to do so. As the 'sole representatives of Libya' and the clear revolutionary aims of the movement it represented, the council patently rejected the legitimacy of Col Gaddafi's

⁶⁴ The Founding Statement of the Interim Transitional National Council, accessed online 6 April 2011, <http://ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council/>.

⁶⁵ Derrida, "The Force of Law," 238-242.

⁶⁶ The Founding Statement of the Interim Transitional National Council, <http://ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council/>. Accessed online 6 April 2011.

governance of the country. Those members of Gaddafi's regime, however, who defected to the NTC were told that they would retain their status as an international representative but would, from the point of their defection onwards be carrying out their duties on behalf of the NTC rather than Gaddafi. This makes the foundation to the NTC's authority, in a sense, doubly mystical. Rather than even feigning a legitimacy that is derived from the people or from God, the representatives of the NTC derived their legitimacy from the mere fact that they are member of the NTC. In terms of the international representatives, the legitimacy of the old regime's appointments was appropriated by the council and then served as the basis by which those international representatives could claim to legitimately represent the NTC. The "doubly mystical" nature of the NTC's foundation relies on the simultaneous inference of a self-founding legitimacy – the legitimacy that based its authority on nothing more than the fact that it made such a claim – and the legitimacy that derived its authority from an external source of power. Ironically, in this case the external power source was the very regime against which the NTC is campaigning. The Council's authority belied a "mystical" foundation, either deriving its legitimacy from a dubious self-founding circularity or from the very regime that it claimed to be illegitimate. This double gesture, whilst seemingly contradictory, does have some political purchase: the NTC offered an olive branch to those members of the old regime who were toying with defection but, at the same time, it managed to claim a modicum of independence and set itself up in direct opposition to Gaddafi's regime. The paradox of the NTC's foundation is perhaps what gave the Council such political pull. Its paradoxical double gesture was perhaps what gave the NTC its 'sought after effect'.

The NTC's founding statement, conforming to the quasi-logic of the simultaneously constative and performative speech act, declares that:

It [the NTC] is the sole representative of all Libya with its different social and political strata and all its geographical sections. Its membership is open to all Libyans. The council is waiting for the delegations from Tripoli, the south Areas and Middle areas of Libya to join it.⁶⁷

In an accompanying document to the official declaration, the NTC stated that it 'calls on all the countries of the world to recognize it and deal with it on the basis of international

⁶⁷ The Founding Statement of the Interim Transitional National Council, <http://ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council/>. Accessed online 6 April 2011.

legitimacy'.⁶⁸ The declaration instigated a strange temporal disjointure that echoes our discussion of Derrida's reading of The American Declaration of Independence above. The NTC's founding signature calls for countersignature: it claims to be legitimate but can only be considered such once other nations acknowledge that legitimacy; it needed the fabulous retroactive affirmation of a response. Moreover, the declaration itself can only be considered a countersignature to a broad and diverse expression of anger and frustration that the anti-Gaddafi movement expresses. The content of the declaration simply acknowledges (and thus countersigns) the anti-government protests that erupted in February 2011. As "Declarations of Independence" suggests, the signature is constituted by the trace of more primary affirmations so, as we suggested above, the founding statement conjures into being a unity that does not exist. In becoming "the voice of the rebels" the NTC necessarily silences the multiplicity of voices that constitutes the rebellion itself. And the response made by the international community to the NTC's claim to be the sole legitimate representative of Libya went a long way in ensuring that that silence was complete. The NTC was formally recognized as the government of Libya by 32 countries. The NTC called for a response and many countries answered. These responses themselves were performative utterances: British foreign secretary William Hague's declaration that the NTC is now recognized as a legitimate government by the British government is the co-performative that responds to the foundational (counter)signature. These countersignatures that recognized the unity of the revolutionary movement affirmed a conjured assemblage and effaced the multiplicity of voices that was the rebellion's condition of possibility.

The performative declaration transforms a plurality of speakers and actors that swear together (*con jurare*) into a unified "we" of "the people." Following Austin's account of the performative outlined above, we can see that the declaration is conditioned by a paradigmatic privileging of intention and presence. The absent voices and unarticulated gestures represent a general possibility of there being a declaration at all. It is this general possibility that is dismissed when the jurisdictional moment is announced. From this informal articulation is conjured a formal face and mouthpiece that can claim, at the very present moment it speaks, to represent the Libyan people. This presence, however, is

⁶⁸ "Introducing the Council" accessed online 6th April 2011, <http://ntclibya.org/english/about/>. Accessed online 6 April 2011.

predicated on a prior movement, akin to iterability, that the metaphysics of presence (the temporal paradigm in which the declaration is caught) seeks to efface. These other voices, spectral though they may be, interrupt the proclaimed sovereign unity of the declaration, they interrupt the purity of the jurisdictional moment. I suggest that responsibility, in a deconstructive register, infers a response to the absences which make a purported “presence” possible. Assessing the nature of this responsibility in relation to the performative speech act is the task to which we now turn.

3.4 Responsibility

By putting Derrida’s account of the performative in a wider context, particularly in relation to his displacement of a temporal economy that maintains a privileged position for the present speaking subject, we have suggested that a performative speech act represents a rupture that opens itself to an unpredictable future or *à venir*. Jurisdiction (the performative speech act of the law) seeks to ground the law and determine the presence of a community. But, as we have suggested with Derrida, this presence is illusory. The performative creates but a ghostly presence, caught between the past and future: the unity and sovereignty that the performative proclaims can only appear in spectral form. Nonetheless, the force and effect of the declaration is undeniable; the ghostly is not without affects. Crucial to our present concern is the nature of the responsibility that such a declaration engenders. The argument pursued here is that the conditions of possibility of the declaration discussed above provide the very same conditions of possibility for a deconstructive account of responsibility. Derrida’s concern to expose the absence that underpins a purported presence in his reading of Austin sets a marker for the nature of the responsibility for which such a performative calls.

For a term with such strong contemporary import, the notion of “responsibility” has a relatively recent heritage. Emerging hand-in-hand with (human) rights discourses, responsibility is most commonly associated with a typically modern, liberal conception of the subject. As a category, responsibility appeared in post-Enlightenment thinking (the term’s earliest known usage in English is 1787)⁶⁹ and, as Scott Veitch suggests, is primarily concerned with ‘the notion of the autonomous individual, in theory equal (or equalized)

⁶⁹ The Oxford English Dictionary.

with his or her others, and having the equal capacity for mental knowledge and will'.⁷⁰ Responsibility attaches to an individual for acts done or crimes committed, but so too does responsibility look to the future, conditioning decisions to come.⁷¹ The plurality of registers on which responsibility operates – from the moral to the political, the prospective to the retrospective, civil to the criminal – calls not for some essentialised definition but an openness to competing modes and techniques of responsibility. Veitch suggests that any account of responsibility must contend with a plurality of “responsibility practices” or a variety of “technologies of responsibility.”⁷² Following this approach, what follows, does not attempt to provide a comprehensive or determinative account of responsibility, rather, it is suggested that by assessing the structural conditions of possibility of the declarative jurisdictional moment, we can understand one of the ways in which such events condition responsibility to them. It is, then, the question of how we respond to the claim to found a community, institution or law that is discussed here. How do we counter-sign jurisdiction?

Iris Marion Young observes that political responsibility is ‘something essentially forward-looking’, concerned with the prospective decision rather than the guilty deed already committed.⁷³ In this sense, we too are concerned with “political responsibility.” Young suggests that political responsibility presses upon one ‘always *now* in relation to current events and in relation to their future consequences’.⁷⁴ It is an acceptance of the urgency of responsibility with which this current discussion tries contend, however, the implicit temporal structuring evidenced in Young’s characterisation of responsibility is put into question. The sense of responsibility developed here rejects the idea that one can ever be *essentially* forward looking in assessing responsibility. Responsibility will always be conditioned by the past and hold open a promise of the future in precisely the same way as the performative speech act discussed above. It is the structural isomorphism of responsibility and the performative that puts the traditional notion of individual responsibility out of joint and reveals a particular deconstructive mode of (political)

⁷⁰ Scott Veitch, *Law and Irresponsibility* (Abingdon: Routledge, 2007), 35.

⁷¹ As Alan Norrie suggests, “responsibility” involves both answerability and culpability, both being *called to respond* to something and being *held responsible* for something. See Alan Norrie, “‘Simulacra of Morality’? Beyond the Ideal/Actual antinomies of Criminal Justice” in *Philosophy and the Criminal Law* ed. A Duff (Cambridge: Cambridge University Press, 1998), 114.

⁷² Veitch, *Law and Irresponsibility*, 37-42.

⁷³ Iris Marion Young, *Responsibility for Justice* (Oxford: Oxford University Press, 2011), 92

⁷⁴ Ibid.

responsibility. This notion of responsibility is discussed in relation to Jean-Luc Nancy's response to the situation in Libya in 2011.

3.4.1 Inheritance and (ir)responsibility

Unlike Young, Derrida suggests that responsibility is at once forward and backward looking, caught in a temporal flux that makes the truly (or purely) responsible decision impossible. As has been our concern throughout, this notion of responsibility contends with an understanding of temporality without a privileged notion of presence. Responsibility thought as that which is owed by and attributable to a monadic liberal subject conforms precisely to such a privileging of presence that, through Derrida, I want to interrupt. The (traditional) notion of individual responsibility effaces that which is not present: circumstances and histories that condition one's "present" acts for which one is supposedly responsible. Derrida's reading of metaphysics challenges this thinking and – in a quintessentially deconstructive move – privileges that which is traditionally ignored. The absent, rather than the present, becomes the lodestar which should guide our sense of responsibility.

This privileging of the absent – the spectral pasts and othernesses that constitute the present – is perhaps most clearly discernable in Derrida's characterization of ontology as *hauntology*.⁷⁵ Hauntology would favour (spectral) absence over presence and difference and plurality over the logic of *the same*.⁷⁶ The subject for Derrida is itself constituted by spectres: 'ego = ghost... therefore "I am" would mean "I am haunted"'.⁷⁷ Hauntology, then, compromises the *presence* of ontology, inscribing a differential temporality into every "present" instance. This hauntology, Derrida tells us, is 'larger and more powerful than an ontology or a thinking of Being... of the "to be," assuming that it is a matter of Being in

⁷⁵ Hauntology (homophonic in the French with *ontologie*) is a term developed in *Spectres of Marx*. Like many of the terms that Derrida deploys, hauntology supplements (in a doubled sense of standing in for and enhancing) the notion of *différance*. That Derrida is happy to shift between the various concepts (autoimmunity, iterability, hauntology and so on) to tackle particular concerns performs the very indeterminacy that these concepts try to capture. Significantly, Derrida does not allow one concept – *différance* or even "deconstruction" – to become central or orientating principle for his thinking.

⁷⁶ That ontology reduces difference by levelling out all things is key to Derrida's deconstruction. In this regard, Derrida is indebted to Emmanuel Levinas. For a discussion of Levinas and Derrida's deconstruction of ontology see Jacques Derrida, "Violence and Metaphysics" in *Writing and Difference*, trans. Alan Bass (London: Routledge, 2008).

⁷⁷ Derrida, *Spectres of Marx*, 166.

[Shakespeare's] "to be or not to be," but nothing is less certain'.⁷⁸ If the "I" itself is haunted, a subject more spectral than present, the discourse of responsibility changes tenor. Derrida suggests that such a responsibility involves a thinking beyond all living present, suggesting that we are called to be responsible:

before those who are not yet born or who are already dead, be they victims of wars, political or other kinds of violence, nationalist, racist, colonialist, sexist, or other kinds of exterminations... Without this *non-contemporaneity with itself of the living present*, without that which secretly unhinges it, without this responsibility and this respect for justice concerning those who *are not there*, what sense would there be to ask the question "where?" "where tomorrow? "whither?"⁷⁹

Such a responsibility is impossible. It is a wildly exaggerated responsibility, a responsibility to and for that which we do not and cannot yet know, a responsibility for acts done without our knowledge, a responsibility beyond the living, beyond those present, beyond – surely – the human too. Where does one start with such responsibility? For Derrida the answer lies in inheritance. We are, from the off, burdened with a responsibility with and for the ghosts that we inherit simply by our being who we are: 'one is responsible before what comes before one but also before what is to come and therefore before oneself'.⁸⁰ We are encumbered by our ghostly inheritance and this inheritance prompts and conditions our responsibility. Evoking a doubled sense of "before" – meaning both "prior to" and "in front of" – responsibility is always doubled, one is not only responsible to our history ('what comes before one') but also to what is to come ('what is before one'). Our inheritance prompts a simultaneous obligation to the past and to the future; it invokes – or conjures, we might say – a "spectral responsibility": a responsibility to the ghosts of the past that figure in the "present" and to the ghosts to come that will be effected by our actions in the here-and-now. This thinking of responsibility disturbs the liberal monadic notion of the self that is frequently associated with term. The subject cannot be the ultimate guarantor of one's responsibility, rather every singularity is radically exposed to a responsibility beyond themselves. In relation to jurisdiction's claim to found a political institution like the NTC, such a thinking opens responsibility to a necessary attentiveness to that which is effaced, consolidated or elided in the declaration, to that plurality of voices which is the condition of possibility of the declaration itself.

⁷⁸ Ibid., 63.

⁷⁹ Ibid., xviii.

⁸⁰ Jacques Derrida and Elisabeth Roudinesco, *For What Tomorrow... : A Dialogue* (Stanford, Stanford University Press, 2004), 5-6.

How can we be responsible when the stakes have been raised so high? Even with a sensitivity to inheritance, can we ever contend with this wild, spectral, hyperbolic responsibility? We must, it seems, answer this in the negative. All we are left with are degrees of irresponsibility.⁸¹ With responsibility given such an expansive scope, we are bound to fail. But this impossible responsibility is itself the condition of possibility for the “responsible” decision. The decision, though never capable of contending with this exaggerated responsibility, must pass through it, responsibility must negotiate with the incalculable and pass through this aporetic experience.⁸² As should be clear, however, this “decision” cannot be the subject’s alone rather it appears from/within a play between autonomy and heteronomy. The question of whether a decision is made by the subject or produced through an encounter with a particular situation must be left unanswered: it is this experience of the undecidable with which the (always partial, always already irresponsible) “responsible decision” must contend. As Derrida suggests in relation to a responsibility for a new thinking of European identity: ‘the condition of this thing called responsibility is a certain experience and experiment of the possibility of the impossible: the testing of the aporia’.⁸³ I want to put this conception of responsibility in conversation with Nancy, assessing how he tests the aporia that Derrida evokes in relation to his response to the Libyan declarative act discussed earlier.

⁸¹ The notion of responsibility being essentially *irresponsible* is developed most clearly in *The Gift of Death*. In a reading of Kierkegaard’s discussion of the *akedah* (the binding of Isaac in Genesis chapter 22) Derrida suggests that Abraham’s impossible decision to kill his son at God’s command is analogous with every confrontation with the responsible decision. Derrida’s point is that the responsibility to the absolute Other of God (analogous in our discussion with the impossible and expansive responsibility to spectrality) will always infer the need for sacrifice. Putting the difficulty more prosaically, Derrida suggests that in doing his work as a philosopher – writing and speaking in public and so on – he might be thought to be doing his duty or fulfilling his responsibilities. But, Derrida notes, ‘I am sacrificing and betraying at every moment all my other obligations to the others whom I know or don’t know, the billions of my fellows (without mentioning animals that are even more other others than my fellows) my fellows who are dying of starvation or sickness.’ Every seemingly “responsible decision” will involve a sacrifice of some other, a sacrifice (importantly) for which there can be no absolute justification. See Jacques Derrida, *The Gift of Death*, trans. David Wills (Chicago: University of Chicago Press, 1995), 69 and more generally, 53-81

⁸² See Derrida, “Force of Law,” 257.

⁸³ Jacques Derrida, *The Other Heading*, trans., Pierre Brault and Michael Naas (Bloomington: Indiana University Press, 1992), 41.

3.4.2 Nancy and the leap of political responsibility

Initially published in *Libération* under the title “Ce que les peuples Arabes nous signifient,” (28th March 2011)⁸⁴ Jean-Luc Nancy’s response to the situation in Libya, and implicitly the foundation of the NTC, was to support NATO-led military intervention. The rebels in Benghazi, Nancy argues, are calling for help and, in order to fulfil our political responsibility, we must make a decision, we must deal with the situation that confronts us. Political responsibility, for Nancy, entails ‘weighing up and dealing with the circumstances’⁸⁵. Whilst conceding that this is a ‘delicate task’, Nancy argues that the ‘collateral risks and suspicions of hidden interests’⁸⁶ along with the heavy guilt associated with a colonial past in the region are no longer chief concerns in our contemporary, globalized world where sovereignty no longer belies the cachet it once did. Nancy is not so naïve to suggest that this globalisation signals a turning point for the West – as if it had somehow ‘cleaned up its act’ – rather it prompts a new thinking of our responsibility and a renewed awareness of our being-with others. He writes:

We are no longer just simply in the world of Western arrogance, self-confidence and imperialism... [the world is] in the process of melting in the fusion that begets another world, without sunrise or sunset, a world where it is day and night everywhere at the same time and where it is necessary to reinvent the act of living together and, before all else, the act of living itself.⁸⁷

The fact of this changing geo-political landscape prompts a responsibility that none of us can turn away from: Gaddafi, ‘the vile assassin of the people’⁸⁸ must be confronted. Echoing Derrida’s desire ‘to learn how to live finally,’⁸⁹ Nancy suggests that our responsibility to act speaks directly to what we want to live and how we want to live it.

As Stewart Motha has rightly pointed out,⁹⁰ underpinning Nancy’s response to the situation in Libya is his understanding of how sovereignty has become emptied of meaning in the

⁸⁴ This text was subsequently translated by Gilbert Leung and posted on the “Critical Legal Thinking Website” as “What the Arab Peoples Signify to Us”. See <http://www.criticallegalthinking.com/?p=2793>. Accessed online 21 May 2012.

⁸⁵ Jean-Luc Nancy, “What the Arab Peoples Signify to Us.”

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Derrida, *Spectres*, xvi.

⁹⁰ Stewart Motha, “The End of Sovereignty, in North Africa, in the World” published in response to Jean-Luc Nancy’s article. Published online, 19 April 2011, see <http://www.criticallegalthinking.com/?p=3007>. Accessed online 21 May 2012.

monde mondialisé or globalized world. The (globalized) world, for Nancy, is one in which transcendent sources of authority – the Christian deity or the notion of a privileged Western civilization – no longer have purchase. We are instead confronted by the problematic of “globalized” or “worldwide” authority. The very notion of such authority, Nancy argues, rests on a “sovereignty without sovereignty” or, following Bataille’s formulation, a conception of “sovereignty as nothing”. Such a thinking of “nonsovereignty” or “sovereignty without sovereignty” involves thinking beyond the association of sovereignty with “the people” or “the nation” but so too does it put into question the sovereignty of the I, *ipse* or *autos*. Without the (sovereign) subject orientating our conception of the world, Nancy affirms our always already co-implication *with others*. We are beings, Nancy insists, who are intractably *with others*, always ‘exposed to others, always turned toward an other... never facing myself’.⁹¹ This “with-ness” cannot be essentialised, named or identified, for in naming or essentialising we are returned to the logic of sovereignty that Nancy is trying to think beyond. Indeed, naming or symbolizing as such, comes only after the originary condition of being-in-common: ‘before the symbolic, there is this spacing out without which no symbol could symbolise: there is being-in-common, the world’.⁹² All this is significant because it provides a frame through which we should understand Nancy’s thinking in relation to Libya. We are responsible because we are always already bound up with the suffering and the perpetrators of that suffering. We owe a responsibility because of our bare fact of being-with.⁹³ There is no safe place, no sovereignty which will guarantee our righteousness in either action or inaction.

It is in the name of political responsibility that Nancy makes his intervention regarding Libya. If we are to address the sense of responsibility at stake here we must first assess the sense of “the political” he evokes. I want to suggest that Nancy’s distinction between “the

⁹¹ Jean-Luc Nancy, *The Inoperative Community* (Minneapolis, University of Minnesota Press, 2008), xxxvii-xxxviii.

⁹² Jean-Luc Nancy, *The Sense of the World* (Minneapolis, University of Minnesota Press, 1997), 48.

⁹³ As Vikki Bell points out, Judith Butler draws on Nancy to develop a similar ethio-political responsibility. Writing in the aftermath of 9/11, Bell argues that we should read Butler’s engagement with Nancy as underscoring, along very similar lines to those sketched here, the politics at stake in marinating a fundamental plurality to individuality. See, Vikki Bell, *Culture and Performance: The Challenge of Ethics, Politics and Feminist Theory* (Oxford: Berg, 2007), 20-25.

political” (*le politique*) and ‘politics’ (*la politique*)⁹⁴ is key to understanding his thinking here. Commenting on Nancy’s ‘War, Law Sovereignty – Techne’, Ian James suggests that:

On the one hand there is the empirical and immediate realm of politics, of our events and our responsibility to them. On the other hand, and perhaps prior to this first moment, there is the responsibility of thought, which leads Nancy to consider the historical and contemporary sense of war, law, or sovereignty in a philosophical idiom.⁹⁵

In Nancy’s *Libération* article we seem to be in the realm of politics – of events and our responsibility to them – rather than the realm of the historical or philosophical reflection on “the political.” However, the decision, with its directedness towards events and responsibility (*la politique*) is always already bound up with the political (*le politique*), that is, with a responsibility to the ontological determination of how we are “with others.” Nancy’s characterisation of responsibility is on the one hand universal, owed by virtue of the “with” that is or makes up being but on the other is directed to the particular, quite specifically to ‘the Benghazi insurgents are asking for help’. We might think of Nancy’s responsibility in *ethical* terms: a response sensitive to the immediacy of a situation and addressing the urgency of a call. We are responsible through our ontological exposure to others and we are guided by the immediacy of the call this makes. As Ian James points out, Nancy’s ontology ‘enacts itself as an *ethics* of, and an address to, the singular-plural of being’⁹⁶

In a recent essay, ‘The Political and/or Politics’,⁹⁷ Nancy returns to the question of the *différential* relationship between politics and the political. Referring to his work with Philippe Lacoue-Labarthe in the 1980s, Nancy affirms the obscurity of the localisation of politics suggesting that, ‘it is... a question of ‘place’: we need the right place for politics’;⁹⁸ a

⁹⁴ This distinction is seen in the German *das politische* and *die Politik* and the Italian *il politico* and *la politica* (Christodoulidis 2008, p. 192). Since founding the *Centre de Recherches Philosophiques sur Le Politique* Nancy’s thinking has been concerned with a certain ‘withdrawal from politics’ in favour of a philosophical thinking of the political. For commentary and critique on this distinction see S. Critchley *The Ethics of Deconstruction* (Oxford: Blackwell, 1992), 200-219.

⁹⁵ Ian James, *The Fragmentary Demand: An Introduction to the Philosophy of Jean-Luc Nancy* (Stanford: Stanford University Press, 2006), 154.

⁹⁶ *Ibid.*, 113, my emphasis. Nancy’s ontology is ethical in the sense that it appeals to “ethics” as *ethos* or dwelling. Our ethical obligations are born out of the fact of our dwelling with others. Like ontology, ethics in this sense is something with which we must always already be grappling. This sense of ethics as *ethos* and its relation to ontology is discussed in Martin Heidegger, “Letter on Humanism” in *Basic Writings* (London: Routledge, 2011), 173-176.

⁹⁷ Jean-Luc Nancy, “The political and/or politics,” trans, Christopher Saunders. This text was distributed at the ‘Derrida-Konferenz,’ Frankfurt Germany, 14 March 2012.

⁹⁸ *Ibid.*, 2.

place, Nancy suggests, that would be neither apolitical nor totalising. But the very fact of the obscurity of this placing of politics reveals the differential logic that structures the concept. Nancy distinguishes between two accounts of politics: 'politics understood as taking over [*comme assumption de*] the 'being of man in his relation to beings' and politics understood as the particular sphere designated to hold open the access to such a relation'.⁹⁹ For Nancy, politics – the question of events and our responsibility to them – remains alive so long as it is a question of holding open the various possibilities of our being together rather than determining those relations in advance. Nancy's conception of the '(k)not' in *The Sense of the World* vividly illustrates this point. The sense of communality that underpins the truth of democracy, for Nancy, is expressed in the tying of the '(k)not'.¹⁰⁰ The relevance of Nancy's ontology of being singular plural is clear here. The (k)not refers to the sense of communality that resists the destructive, totalitarian consequences of *communion*.¹⁰¹ The *knot* of the '(k)not' indicates our being-in-common, the bare (ontological) *political* fact of our communality. But the *not* of the '(k)not' refers to the inoperativity of this communality, implying an unworking and unravelling that prevents the knot being tied. We can distinguish between a politics that keeps open the possibility of the (k)not from a politics of the knot, already tied – a politics that determines our relationality in advance.

In this way Nancy's intervention should be properly conceived in terms of Derrida's aporia. Following Nancy and Derrida, we might suggest that political responsibility calls at once for a negative gesture of patient critique, reading and deconstruction whilst at the same time calls for the positive effort of decision and intervention. But these dual imperatives are irreconcilable, one cannot win out in the end. Responsibility lies in an ongoing but always partial negotiation between the *not* of deconstruction and critique and the *knot* of the decision, position and intervention. If we follow Nancy and Derrida we are left in a somewhat disquieting predicament. If the decision appears in this aporetic negotiation between the registers of politics and the political we can never know, absolutely, whether the right decision has been made for every decision will always already be compromised in

⁹⁹ Ibid., 8

¹⁰⁰ Jean-Luc Nancy, *The Sense of the World* (Minneapolis: University of Minnesota, 1997), 111.

¹⁰¹ Nancy distinguishes between 'communion' – a being-together conceived as a unity – and '(inoperative) community' – a being-together orientated around difference that does not posit a unitary sense of togetherness. For Nancy, what is often referred to as 'community' reveals the totalising and unifying work of 'communion'. *The Inoperative Community* works to reveal the constitutive sense of inoperative community covered over by communion's unifying logic. See Jean-Luc Nancy, *The Inoperative Community*, 12.

advance by the expansive spectral (or political) responsibility that is its condition of possibility. Rather than offering normative guidance or assurance, both Nancy and Derrida locate the site and space of responsibility but do no more. From this site lies both *the risk* and *the promise* of the decision. We are left to gamble on our luck but –paraphrasing the epigraph to the present chapter – we gamble with odds beyond measure. The decision, then, as Nancy says of freedom, comes in *leaping*.¹⁰² Not that the leap will lead us to the right decision, or that if we leap correctly through/from the aporia we will have access to the responsible decision. Rather, it is the knowledge that we cannot guarantee a safe landing from our leaping that makes a responsible decision worthy of the name.

3.5 Conclusion

Let me conclude by drawing the discussion back to jurisdiction and suggest how the notion of responsibility outlined here helps us think about the law's founding moment. Through Derrida's reading of Austin we suggested that the performative jurisdictional moment is conditioned on a prior movement (or iterability). The jurisdictional declaration seeks to efface this prior movement in its reliance on a metaphysics that privileges the presence of the speaking subject and the presence of the community that that jurisdiction proclaims. The unity and presence of the community – the people, the NTC or whatever – is conjured by the performance of jurisdiction. Such presence and unity is predicated on a prior absence and difference and it is this prior *différential* space that conditions our responsibility to jurisdiction; that which is absent conditions our countersignature of the declaration. The Libyan declaration discussed in this chapter serves to illustrate what is at stake in the negotiations prompted by the jurisdictional declaration. The declaration itself evidences the theoretical position outlined here. And, following Nancy, we can get a sense of a deconstructive mode of action and decision.

As I suggested above there is a structural analogy to be drawn between the performative speech act that announces the presence of a political and legal community and the responsibility that such a pronouncement engenders. Both represent a rupture that displaces a temporal economy in which the presence of the speaking, acting, responsible subject is privileged. It is *absence* rather than *presence* that has been privileged in the

¹⁰² Jean-Luc Nancy, *The Experience of Freedom*, trans. B. McDonald (Stanford: Stanford University Press, 1993), 58.

foregoing discussion. This absence is key to understanding the risk and promise of the responsible decision. Just as responsibility, in the end, is dependent on a leaping – a risk of intervention and decision without any sovereign principle or ground to guarantee one's righteousness – so too is the performative act of jurisdiction a leap that opens the possibility of the best and the worst. Jurisdiction, in the foundational mode discussed here, announces both the threat and promise of a community: the possibility of solidarity and security as well as exclusion and suppression. The responsibility to the declaration, then, works as a persistent reminder of the risk of, and the inherent compromise walled up within, this jurisdictional moment. Both the declaration and responsibility to it will be violent, both necessarily infer certain exclusions. The task, it seems, lies in a striving for *lesser violence*, not an absence of violence or exclusion (as we said, it is important that the expansive notion of responsibility is itself impossible) but a striving towards an accommodation of otherness that both acknowledges the violence inherent in the jurisdictional gesture but also seeks to minimise its force. The question of how community is brought to presence by jurisdictional practices (like the declaration discussed here) is picked up in the discussions in the following chapter. The ethico-political imperative for a lesser violence is central to understanding how we might re-imagine both jurisdiction and community.

Chapter 4

JURISDICTION (UN)GROUNDING LAW: FRATERNITY, COMMUNITY AND BEING IN COMMON

Are we Greeks? Are we Jews? But who, we? (Jacques Derrida)¹

4.1 Introduction

Jurisdiction is not only a question of performative declaration or narrative fashioning. If it were, any group, party or institution could declare its jurisdictional authority in the sort of event discussed in the previous chapter or fashion a narrative that seeks to justify a particular order in the ways assessed in the second. Jurisdiction is not simply theatre, artifice and technicity, it must involve some constitutive relation with community. In the territorial mode, jurisdiction is conceived as being constituted by reference to a particular geographical area and, consequently, to those that happen to fall within this legally defined zone. The “community” that is subject to a jurisdictional authority, on this account, is a pretty vacuous affair that we would be hard pushed to describe as community at all. Community involves something more than the happenstance of one being together with others in a particular spot. Our first task then, if we want to suggest that jurisdiction must involve some relation to a thicker sense of community than the territorial definition infers, is to account for what this community might look like. Secondly, jurisdictional practices and techniques – by asserting the limits and scope of legal authority – appear to be constitutive of community itself. So we also need to account for this function, assessing the particular effects that jurisdiction has in bringing community to presence.

In this chapter I argue that we can understand jurisdiction as having, not only a constitutive relation with what community brings (a sense of identity, common purpose or principles) but also, with what community lacks.² I argue that jurisdiction is the means by which law

¹ Jacques Derrida, *Writing and Difference*, trans., Alan Bass (London: Routledge, 2008), 192.

² I take this formulation of community both “bringing” certain qualities but also being marked by a fundamental “lack” from Richard Joyce, *Competing Sovereignties* (Abingdon: Routledge, 2013), 95-99.

and community are brought into relation but this relation is fragile, unworking or inoperative. In one sense jurisdiction is the means by which law becomes grounded in/by community. However, jurisdiction also works to unground the law because – following Derrida and Nancy – community is never fully determinate or stable and there can be no authoritative designation of the limits of a particular collective. Jurisdiction, in attempting to fix and determine the limits of community, in fact, leads to community’s autoimmune self-destruction. My contention is that jurisdiction, often thought to be solely an act, enunciation or procedure that grounds the law and declares the authority of the community, is also the very practice that forecloses the possibility of there ever being a stable relationship between law and community. Following a non-foundationalist account of community I suggest that jurisdiction both functions to “ground” the relation between law and community but also exposes a fragility within these very categories, “ungrounding” both law and community at the very moment that it purports to stabilise them.

My engagement with community focuses on the deconstruction of community pursued by Derrida and Nancy. The question of community is central to Nancy’s philosophy. In *The Inoperative Community* he develops an account of community quite distinct – indeed contrary to – the kind of communitarian notions most commonly associated with the principle. Community, for Nancy, is defined not by what community posits (that is, some common trait of belonging) but by a more primary connectivity that ceaselessly interrupts such notions. However, for Nancy there remains a promise within “community” and though his work significantly re-works our understanding of community, the signifier remains in place. Nancy reanimates community from within, rather than avoid the notion or develop some alternative concept in its place. In contrast to Nancy, Derrida is deeply suspicious of community. For him, community is conditioned by a thinking that effaces difference and attempts to justify exclusions of otherness by imposing homogeneity within any collective. Community, for Derrida, soon descends into the very bad, having at its root the logics of totalitarianism.

The debate between Nancy and Derrida on community takes up the second part of this chapter. In tracing the continuities and discontinuities between their positions, we can develop an account of community that goes beyond the traditional notion that community is formed around some common trait or shared identity. A deconstructive account of

community, then, forces a reappraisal of jurisdiction's role in bringing community into relation with law. This account of community suggests that there is always an excess to community: community is never fully present and this excess unworks the "ground" that jurisdiction purports to provide. The difficulty that Nancy and Derrida leave us with, however, is in accounting for a sense of community that has some substantive content. The radical critique of community in both Derrida and Nancy's account, comes close to suggesting that community can be thought of as little more than a vacuity of content, a bare and unqualified, if inoperative, fact of relation. If we are to account for the way in which jurisdiction mediates between community and law, we need something more than this. In an effort to rescue community from this apparent "destruction," I turn to Derrida's evocation – pithily captured in the epigraph above – of the community of the question, underpinned by the logic of autoimmunity, a principle of central importance to his later work. Here we have a sense of community as substantive but temporary, a community posited but held in abeyance.

In order to put this discussion of community and law into some context and flesh out the ways in which the deconstructive account differs from those developed in the existing literature, I first turn to American legal scholars Ronald Dworkin and Robert Cover. Though in markedly different ways, Dworkin and Cover both argue that law's legitimacy and efficacy depends on understanding the notion of community to which any given law is supposed to apply.³ Both offer important perspectives on the problems at play in accounting for community's relation to law and their positions serve as a foil by which we can more fully appreciate the radicality of Derrida and Nancy's thought.

Underlying this argument is an ancillary concern to account for the ways in which Nancy and Derrida's positions, though seemingly divergent on the question of community are, in fact, deeply sympathetic. Though adopting different strategies, and pursued in different registers, Derrida and Nancy both argue for a radical re-imagining of community that proffers important political insights. These consequences, only touched on here, are discussed at greater length in the final chapter.

³ For a sociological approach to law's relation to community see, Roger Cotterrell, *Law's Community: Legal Ideas in Sociological Perspective* (Oxford: Clarendon Press, 1995). Cotterrell's pluralism is not dissimilar to Cover's approach in that he retains something of an unproblematic notion of "community" to which the law has a constitutive relation.

4.2 Community, Violence, Law

Dworkin develops a fairly traditional – though problematic – notion of community as providing a legitimate ground for the law. Cover, on the other hand, examines State law's violent capacity to interrupt communities that are themselves generative of law. Though Cover's position contra Dworkin underscores the law's violence in relation to community, community itself remains something of a nostalgic construction in his account. The debate between Nancy and Derrida on community assessed below provides a useful supplement to Cover's account of community, with Derrida in particular arguing that a more radical violence is at stake in community for which we must account.

4.2.1 Communities of principle

A full account of Dworkin's interpretativist contribution to analytic jurisprudence falls well beyond the scope of the present work.⁴ I turn to Dworkin because, in his account of the law, obligations that we owe the State are grounded in the existence of a particular understanding of political community. The jurisdictional authority of State power, for Dworkin, ultimately rest on the existence of a political community that produces, what he terms, "associative obligations". As Dworkin suggest:

The best defense [sic.] of political legitimacy – the right of a political community to treat its members as having obligations in virtue of collective community decisions – is to be found not in the hard terrain of contracts or duties of justice or obligations of fair play that might hold among strangers, where philosophers had hope to find it, but in the more fertile ground of fraternity, community and their attended obligations.⁵

Arguing against a pluralist, or "checkerboard," legality, Dworkin turns to political community to explain the characteristic of "integrity" within the legal system. Integrity – at least the legislative form of "political integrity" with which we are interested here –

⁴ Simply put, Dworkin's "interpretivism" argues that the nature of law lies in understanding the principles that offer the best justification for the practices of a particular community. A set of principles can be identified as offering such a ground through an interpretation of the practices, as well as the desired outcomes of such practices, within the community. Dworkin thus suggests that the judge's task is to interpret a body of law in the "best light" she can, seeking, in her interpretations, the most morally coherent sense of the laws of that community. See Ronald Dworkin, *A Matter of Principle* (Cambridge MA: Harvard University Press, 1985) and Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 2012). For useful account of interpretivism see David Brink, "Legal Interpretation and Morality" in ed., B. Leiter *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001) and for a critical engagement with Dworkin's work see, *Reading Dworkin Critically*, ed., Alan Hunt (Oxford: Berg Publishers, 1992).

⁵ Dworkin, *Law's Empire*, 206.

suggests that lawmakers should 'try to make the total set of laws morally coherent'.⁶ In this sense, integrity is a regulatory ideal to which lawmakers should aspire. Dworkin argues that integrity can be justified neither by appeals to justice nor to fairness as both of these principles appear to support the "checkerboard" pluralism that he wants to avoid. Integrity, then, must be grounded in something else. Dworkin finds this "something else" in his rendering of political community. In this way, understanding what defines a political community as such is central to Dworkin's account of law.

For a community to be considered a genuine "political community" Dworkin posits a number of conditions that must be met. The first is that the community must be a "bare community." By this Dworkin means a community with some minimal criteria of belonging: some genetic, historical or geographical fact, common to all members, that binds individuals together. In addition to this minimal requirement, four further factors are identified: (i) mutual obligations within the community must be distinctive for that community; (ii) such obligations must be of a personal nature, connecting each member of a community to others in the group; (iii) each member must have a sense of responsibility, and aspiration, for the well-being of the group as a whole; and (iv) the obligations and responsibilities owed within the group must be egalitarian, in the sense that each member of the community must engender equal concern and respect within the community.⁷

Out of the three 'models of community'⁸ that Dworkin assesses only one matches the criteria outlined above: the "community of principle." Communities of circumstance and so-called "rulebook communities" are both rejected. The former refers to the sort of community that is subject to a territorial jurisdiction. It is a "community" that comes together through happenstance and though members, through mutual self-interest, might show some signs of cooperation, such a community fails to satisfy the need for the particular attitudes and concerns that Dworkin identifies as crucial for political community.⁹ The community of circumstance is little more than a "bare community" whose members can be recognised as having some commonality but little more. In

⁶ Ibid., 176.

⁷ Ibid., 195-202.

⁸ Ibid., 208-215.

⁹ Dworkin gives the example here of two strangers from different nations washed up on a desert island following a naval battle between the two countries. While each may help the other in the interest of their own survival, there is no "community" between them, in Dworkin's view.

contradistinction, the “rulebook community” is bound by a common acceptance of rules established through particular practices that the community recognises. But Dworkin suggests that this cannot form the basis of a genuinely political community either because the obligations that connect members are superficial, relying only on a formal construction of unity. As such this connectivity is ‘too shallow and attenuated to count as pervasive, indeed to count as genuine at all’.¹⁰ The model of community that satisfies all of Dworkin’s criteria is the community of principle in which members accept that they are bound together, not simply because of shared rules or circumstances but, by common principles. Such an ideal of community that exhibits political integrity and coherence offers a ground for the “law as integrity” argument that Dworkin pursues.

As a list of criteria around which a political community might orientate, Dworkin’s is perfectly adequate. As a basis for justifying the existence of a particular normative order, it is also, in principle, equally plausible: a community might well agree that laws are legitimated not only by the shared (formal) rules of the collective but also common principles or values held by members. But the community of principle that Dworkin imagines, does not exist. This is a fanciful utopia, particularly in relation to an account of the nation State. The problem with Dworkin’s account lies in the very first criteria that he so quickly dismisses. The conditions of “bare community” are, Dworkin tells us, easily identified:

People disagree about the boundaries of political communities, particularly in colonial circumstances or when standing divisions among nations ignore important historical or ethnic or religious identities. But these can be dismissed as problems of interpretation, and anyway they do not arise in the countries of our present main concern. Practice defines the boundaries of Great Britain and of the several states of the United States well enough for these to be eligible as bare political communities.¹¹

In a telling footnote, we can see the difficulty with this assertion. In reference to Great Britain, Dworkin comments, ‘I ignore the special problem of Northern Island here’.¹² Given recent developments in British politics, we would have to add the “special problem” Scotland and Wales – both of whom have strong nationalist movements, with Scotland voting in the summer of 2014 in a referendum for independence – to this note. The so-called

¹⁰ Dworkin, *Law’s Empire*, 212.

¹¹ Ibid., 207-208.

¹² Ibid., 208, n. 24.

West Lothian question¹³ also raises another “special problem” that seems to threaten the existence of a bare political community of Great Britain at all. The key point here is that Dworkin’s model of community accepts as uncontroversial the preordained parameters of the community that the community itself patently holds to be fragile and uncertain. The dismissal of these fundamental concerns as ‘matters of interpretation’ is itself revealing: there is always a multiplicity of interpretations that threaten the supposed unity of a collective. Dworkin’s position implies that there could be a sovereign position from which adjudication over such differences of interpretation might be resolved. But the only legitimate source of authority to make such a judgment, by Dworkin’s own account, must be the political community itself. There is, then, a difficult circularity to Dworkin’s position. The very possibility of a plurality of interpretations regarding the limits of community infers that the “political community” itself must lack integrity. As the recent history of the British Isles clearly demonstrates, such “bare political communities” are not stable or certain and its members are not nearly as willing as Dworkin to accept their (forced) membership in such a collective.

In order to develop this notion of a “bare community” – which, remember, is the *sine qua non* of any political community – these difficulties have to be ignored. Dworkin proceeds as if these complexities did not exist, consigning to a footnote the example that threatens the purity of his account. What this aptly illustrates is that in any positive account of community (that is, one defined in relation to something posited, some common set of principles or mores), there is always a *lack*, a failure of the community to ever be present to itself. Something always escapes the parameters that are erected in the construction of community either because of some contention of the community’s borders or in the challenge to the community’s integrity made by a multiplicity of interpretations of the “principles” which a community is supposedly committed. To be clear, I am not suggesting that Dworkin’s model could be refined in order to account for the particular difficulties in defining the “bare community” of Great Britain. There is, it seems, a structural problem in community itself. As we suggested in the previous chapter, something will always exceed any given determination. In this sense, community not only names the qualities that are *present*, or even aspirational, in a collective but also what is *absent* from the collective, the

¹³ This refers to the contentious issue of whether Members of the Westminster Parliament from Scotland, Wales and Northern Island can vote on matters that only affect England. This rather illustrates the fragility of the political settlement in the UK.

lacuna that lies at community's heart. Dworkin's account, by presupposing the "bare community" as unproblematic fails to adequately address the (perhaps necessary) exclusions and absences that appear within community.

These concerns will be given fuller elaboration in our discussion of Derrida and Nancy below; both of whom hold this fundamental lack within community as central to their accounts of community. Leaving these concerns for the time being, I want to turn now to Robert Cover who offers a useful antidote to Dworkin's approach. Rather than seeing State authority as being guaranteed by a morally and politically coherent community, Cover argues that the State violently destroys community, itself generative of "law." Here, some of the difficulties that haunt Dworkin's account are, rather than ignored, brought to the fore.

4.2.2 Jurisgenerative communities and the jurispathic State

Robert Cover, legal theorist and historian, had a brief but influential career.¹⁴ Animating his work is a desire to account for the central role of violence in the law. As the opening sentence of his essay "Violence and the Word" dramatically illustrates – 'legal interpretation takes place in a field of pain and death'¹⁵ – Cover sought to underscore, rather than obscure, the law's essentially violent function.¹⁶ This involves more than accounting for the judge's power to enact violence (or have other carry out violence) in the name of the law by depriving defendants of property or liberty. The law is also violent in a deeper sense through its imposition of homogeneity within an internally differentiated and heterogeneous polity. However, the law, for Cover, is not solely violent. The law holds a promise of justice and freedom, particularly in its capacity to be a conduit between antagonistic communities who claim to have sovereign authority. It is, in fact, the internal conflict between the violence and promise of law that is central to Cover's work. As Austin Sarat suggests, Cover's essays are primarily occupied by 'an effort to think about law in relation to institutional reality, of its intimate engagements with violence while also

¹⁴ Cover died in 1986 at the age of 42. Many of his essays and articles are collected in, *Narrative, Violence and the Law: The Essays of Robert Cover*, M. Minow, M. Ryan and A. Sara eds., (Ann Arbor: University of Michigan Press, 1992).

¹⁵ Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986), 1601.

¹⁶ Cover explicitly distances himself from Dworkin who, he argues, 'blithely ignores' the violent implications of legal interpretation. See, Cover "Violence and the Word," 1601, n. 2.

attending to its normativity and its normative aspirations'.¹⁷ It is this dual function of law as being something both aspirational and creative, on the one hand, and violent and destructive, on the other, to which we turn here in order to expand on the relation between community, law and jurisdiction.

In "*Nomos and Narrative*"¹⁸ Cover describes the encounter between communities and law as necessarily violent, it is a confrontation in which a plurality of normativity is destroyed. Cover's starting point is to decouple State, or positive, law from a broader category of normativity. As he remarks in the opening passages of the essay: 'we inhabit a *nomos* – a normative universe'¹⁹ that entails that we are always already creating normative distinctions between the permissible and the interdicted, the lawful and unlawful, the bona fide and null and void. Cover suggests that the administrative functions of State law are a part of our normative universe but only 'a small part... [of what] ought to claim our attention'.²⁰ By opening the conversation up to a larger sense of normativity, Cover allows us differentiate between the "law" of the community and the "law" of the State.

This is a significant move in relation to jurisdiction. Jurisdiction does not simply name the force necessary to make visible sovereign authority but also infers a specular function that reflects an extant normativity. Cover offers an account of a fundamental normativity always at work before official sanction or fiat. Given that we inhabit a *nomos*, or normative universe, we are always already implicated in the generation of law and legal meaning. Such legal meanings are articulated from the bottom up, so to speak, produced not by official order but through a series of cultural and social practices. This process of generating legal meaning, Cover names "jurisgenesis." This process is necessarily communal and depends on a community coming together, orientating themselves around particular narratives of order. Such jurisgenerative communities have an educative or "paedic" function – which involves training in a common normative system, the maintenance of a particular (lawful) narrative, the shared belief in the community's identity and so on – as well as a forceful or

¹⁷ Austin Sarat, "Situating Law Between the Realities of Violence and the Claims of Justice" in *Law, Violence and the Possibility of Justice*, ed., Austin Sarat (Princeton: Princeton University Press, 2001), 4.

¹⁸ Robert Cover, "The Supreme Court, 1982 Term – Foreword: *Nomos and Narrative*," *Harvard Law Review* 97 (1983), 4. Subsequent references will refer to this as "*Nomos and Narrative*."

¹⁹ Cover, "*Nomos and Narrative*," 4.

²⁰ *Ibid.*

“imperial” function. The imperial function is “world-maintaining” in that the common *nomos* of a community is enforced by institutions. Cover suggests that in one State there could be a plurality of such jurisgenerative communities, each having a different orientating narrative or set of precepts and each a different set of institutions and conventions that police the community, determining its proper limits. Such communities give sense to the law and, rather like Dworkin’s communities of principle, by creating and nurturing a narrative, ground the law, providing an attachment between the community and the norms by which it is governed. But there is, as Cover suggests, a ‘radical dichotomy between the social organization of law as power and the organization of law as meaning’.²¹ The law is not simply the organic expression of jurisgenerative practices but comes into conflict with the institutional desire to maintain social order.

We have in Cover’s account two jurisdictional practices at work. The first is the notion of jurisdiction (or juris-fiction) that fashions a narrative of order and unity. The second is jurisdiction’s declarative and forceful mode by which divisions and differences are delimited. The generative practices of a community come into most stark conflict with the authority of the judiciary. As Cover suggests, ‘judges are people of violence... judges characteristically do not create law, but kill it’²² by imposing *one* interpretation of the community’s *nomos*, by calling this “law,” and expelling all other claims to legality as heresy. The violence of the judicial decision puts an end to the generative efforts within a community, it stymies the capacity for narrative creation and rather than opening normative worlds, cuts across the *nomos*, delimiting a sovereign legality. Unlike, Dworkin who avoids the question of the judge’s violence all together, Cover argues that the community that offers a ground for the law is always in a conflict with this jurispactic modality. But, as already intimated, Cover is not so simplistic to suggest that judges are purely violent. Cover argues that the jurispactic office is a necessity. Without the regulating efforts of the institution, normative communities would be ‘unstable and sectarian in their social organisation, dissociative and incoherent in their discourse, wary and violent in their actions’.²³ In this sense, ‘judges are also people of peace’²⁴ because they are able to mediate

²¹ Ibid., 18.

²² Ibid., 53.

²³ Ibid., 16

²⁴ Ibid., 53. It should be noted that Cover suggests that the judiciary itself can be seen to be a jurisgenerative community when it opposes the violence and coercions of the State’s other functions (the police, the executive and so on). See Cover, “*Nomos* and Narrative,” 58.

the competing claims of warring communities. Cover, then, does not advocate a non-violent law that allows for the free creation of a plurality of normative meanings. Rather, he suggests a corrective might be found if the judiciary and legal academics were to ‘stop circumscribing the *nomos*... and invent new worlds’.²⁵ Violence, in this sense, cannot be done away with but a “lesser violence” against jurisgenesis might be possible.

There is clearly a strong resonance between Cover’s account of jurisgenerative communities and the jurispathic State and the logic of jurisdiction outlined at the outset of this thesis. Jurisdiction fulfils a dual function of reflection and positing. The jurisgenerative community produces an informal normativity that the State seeks to reflect back in its formal legality. But this latter function of jurisdiction (in delimiting and dividing) is necessarily violent because it has to cut across the plurality of communities that produce the law. Following our discussion of Derrida’s analysis of Kafka in the second chapter, however, can we not posit a “law” prior to community? Cover’s account suggests a conflict between a “law” produced through communities coming together around particular narratives and attaching to certain identities, and “State law” that, in the name of social control, destroys the plurality of community normativity. If we live in a normative universe, always already producing legality, does community itself, rather than solely the State, not circumscribe this normativity in the name of the law? Both Derrida and Nancy suggest that a more fundamental law – the “law before the law” or “law of abandonment” – precedes the violence of the State that affects the jurisgenerative community.

In accounting for the violence in the community’s encounter with State law, Cover provides a supplement to Dworkin’s idealistic communities of principle. Cover makes clear that the “bare community” (in Dworkin’s terms) cannot be so easily assumed but itself is produced through a dynamic and inherently unstable set of relations between communities and the State. Cover, however, remains wedded to an essentially positivist account of community. Community is defined by the common narratives and practices that inhere within a collective. The community encounters violence from either the State’s jurispathic modality or from other jurisgenerative communities. The jurisgenerative community for Cover is not inherently violent but has violent encounters with its various others. By urging us to “invent new worlds” and to limit the violence of State law, Cover suggests that the plurality of the

²⁵ Ibid., 68.

“laws of the communities” might be protected. But “law” in this understanding remains tied to a fiction of unity and a hierarchy of interpretative practices. Cover’s hope for a greater plurality of communities, casts community in somewhat nostalgic terms, as if community itself could not be the harbinger of some inherently violent or totalitarian logic. Through Derrida we can radicalise Cover’s understanding of the function of violence in the community. Rather than seeing the community as coming into conflict with the violence of the State or other communities alone, Derrida makes the case for thinking of community as always already violent.

Cover’s essay is useful in the present context because it illustrates how the two jurisdictional practices assessed in the thesis so far come into conflict. The narrative of order fashioned by jurisgenerative communities has an antagonistic relation with the jurisdiction of a unitary State, which seeks to declare the sovereignty of one law. What is not assessed by Cover, and why we now turn to Derrida, is the effect that jurisdictional practices have within community itself.

4.3 Community as Fraternity

Derrida has something of a vexed relation to community. It is clear that he had no time at all for communitarian politics, fraternities or any community thought of as essentialised, closed or wholly present. Following much of the work of *Le Centre de Reserches Philosophiques sur le Politique*, established by Nancy and Lacoue-Labarthe in 1980, Derrida associates the closure of absolute or transcendental presence with totalitarianism.²⁶ In this sense totalitarianism is not simply a political problem but one intimately connected to the history of metaphysics. As Ian James points out, this view is shared by Nancy and Lacoue-Labarthe who ‘view totalitarianism as an effect of a certain relation to transcendence such as it is played out within the metaphysical tradition’.²⁷ For Nancy, totalitarianism resides in the attempts to either invest a community’s identity with a transcendent quality or claim that such identity is immanent to a collective. Nancy’s work attempts to re-think what he claims to be our originary being-in-common in a way that does not lead to totalitarian

²⁶ Much of this work was carried out at *Le Centre de Recherches Philosophiques sur le Politique*, established by Nancy and Lacoue-Labarthe in 1980. Many of the significant papers published at this time are collected in Phillipe Lacoue-Labarthe and Jean-Luc Nancy, *Retreating the Political*, ed. Simon Sparks (London: Routledge, 1997).

²⁷ James, *The Fragmentary Demand*, 163.

closure. Derrida, explicitly at least, does not follow Nancy in this endeavour. Rather, he is content to restrict himself to a critique of any sense of closed, programmatic community or fraternity. This rejection of community is, perhaps, most clearly elaborated in *A Taste for the Secret*:

I do not define myself on the basis of elementary forms of kinship... I am not part of any group... I do not identify myself with any linguistic community, a national community, a political party, or with any group or clique whatsoever, with any philosophical or literary school.²⁸

This rejection of “community” is tied to Derrida’s wariness of a “fraternity” residing in community. Community is bound, for Derrida, to a logic of fraternisation whereby the *other* is transformed into the *brother*, where communal relations are governed by a paternalism and homogeneity, where difference is elided. Any evocation of community for Derrida will always already imply a certain spirit of fraternity that will violently exclude the singularity of the other.

In conversation with Elisabeth Roudinesco, Derrida traces this ‘malaise that rendered [him] inapt for “communitarian” experience’²⁹ to his troubled school days when he was expelled from his *lycée* because of the anti-Semitic policies of the Vichy government during the Second World War. Derrida later enrolled in an temporary *lycée* for Jewish children but, as Benoît Peeters explains, this reinforced a reticence with community: ‘while his exclusion from Ben Aknoun [Derrida’s first *lycée*] had deeply wounded [him], he balked almost as much at what he perceived as a “group identification”. He hated this Jewish school right from the start.’³⁰ This experience seems to have marked Derrida’s approach to community. As we will see in what follows, the root of this malaise is directed towards the *predetermined* criteria of belonging to a particular community. Derrida suggests that this violent predetermination – that excludes certain individuals and accepts others, without question – is the precondition for any community and it is for this reason that he does not engage with the notion.

²⁸ Jacques Derrida with Maurizio Ferraris, *A Taste for the Secret*, trans. Giacomo Donis (Cambridge: Polity, 2001) 27. Quoted in Miller, *For Derrida*, 131.

²⁹ Derrida and Roudinesco, *For What Tomorrow...: A Dialogue* (Stanford: Stanford University Press, 2004), 111

³⁰ Benoît Peeters, *Derrida: A Biography* (Cambridge: Polity, 2013), 20-21

For Derrida, “community” is little more than a “fraternity” that not only subsumes the individual into a homogeneity but imposes a gendered (but apparently neutralised) understanding of community. Here we see a further limitation with Dworkin’s supposedly uncontroversial assertion of “bare communities.” For Derrida, these bare communities that presuppose some minimal common trait of belonging are themselves the progenitors of a totalitarian logic of “fraternisation.” Such fraternisation will always work to make relations between members of the community appear “natural”: *as if* the community were not constructed, artificial, partial and so on, but simply a given. It is the phantasm of naturality, or a certain “re-naturalisation” that is at stake in fraternisation. As Derrida suggests:

Let us not forget, that it is not the fraternity we call natural (always hypothetical and reconstructed, always phantasmatic) that we are questioning and analysing in its range and with its political risks (nationalism, ethnocentrism, androcentrism, phallocentrism etc.), it is the brother figure in its re-naturalising rhetoric, its symbolics, its certified conjuration – in other words, the process of *fraternisation*.³¹

This logic of fraternisation conditions the very possibility of community. As Marie-Eve Morin suggests: ‘The woman gets included in fraternity when she becomes a brother for humanity... [because] “man” is the archetype of humanity and “brother” the archetype of the relation between siblings, the woman can become human or sibling only insofar as she resembles the archetypes of ‘man’ or “brother”’.³² In a community of brothers, or a community that evokes fraternity, the masculine authority of the brother (and by extension the son, husband, father) is privileged.³³

Unlike many of his contemporaries, Derrida offers a radical critique of community, suggesting that ‘there is still perhaps some brotherhood in Bataille, Blanchot and Nancy and I wonder, if it does not deserve a little loosening up, and if it should still be a guide for community’.³⁴ In *The Experience of Freedom*, for example, Nancy explicitly connects community to fraternity, aligning “fraternity” with an excessive and immeasurable notion of the sharing out of our being in common, suggesting that ‘fraternity is equality in the sharing

³¹ Derrida, *The Politics of Friendship*, trans., George Collins (London: Verso, 2005), 202.

³² Marie-Eve Morin, “Putting Community Under Erasure: Derrida and Nancy on the Plurality of Singularities” *Culture Machine*, Vol 8 (2006), n. 2. Available online <http://www.culturemachine.net/index.php/cm/article/viewArticle/37/45>. Accessed, 19th December 2012.

³³ Jacques Derrida, *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas (Stanford: Stanford University Press, 2005), 58.

³⁴ Jacques Derrida, *Politics of Friendship*, 48 n. 15.

of the incommensurable'.³⁵ Derrida questions why Nancy feels compelled to retain the figure of the brother, even if purely symbolic, rather than 'the sister, the female cousin, the daughter, the wife or the stranger, or the figure of anyone or whoever'.³⁶ Derrida rejects the use of "fraternity" as a perpetuation of a Christian and psychoanalytic³⁷ privileging of the masculine figure of authority. Derrida acknowledges that perhaps Nancy's move to co-opt "fraternity" for his own ends is simply the product of desire to recount the narrative of these concepts and highlight what the history of these concepts implies.³⁸ But, Derrida remains concerned by the notion that,

Nancy *would like to believe* in the fraternity of this received narrative... There is someone in me who would like to believe it; but another, another who no longer resembles me like a brother, simply cannot bring himself to believe it, another who even believes, on reflection, and with experience, that it would be better not to believe it, not only but especially when it comes to politics'.³⁹

This concern colours Derrida's rejection of community. Fraternity is rejected because of the gendered, Christian and psychoanalytic heritage overdetermines the concept's use. But community evokes a similarly fraternal spirit where each singularity is reduced to something common, a common *man* where difference is obscured.

4.3.1 The violence of community: singularity and *différance*

The problem that faces Derrida's position – and one that has been underscored by a number of commentators – is that without some account of community and/or fraternity, it is difficult to account for a truly political dimension to his thought. J. Hillis Miller, Wendy Brown and Jacques Rancière all suggest that a kind of individualism underpins Derrida's thinking. For Brown,⁴⁰ Derrida is wedded to a liberal conception of freedom, suggesting that the notion of a "democracy to come" does not allow for a radical re-thinking of democracy because it is confined by a liberal obsession with individualism. In particular, Brown argues

³⁵ Ibid., 72.

³⁶ Jacques Derrida, *Rogues*, 58.

³⁷ Nancy refers to Freud's patricidal myth of the origin of the moral law in *Totem and Taboo* during the discussion of fraternity; the "sharing of the (dismembered) body" evokes a Christian as well as psychoanalytic heritage. Nancy contends that fraternity is, 'the relation of those whose *Parent*, or common substance, *has disappeared*, delivering them to their freedom and equality. Such are, in Freud, the sons of the inhuman Father of the horde: becoming brothers in the *sharing* of his *dismembered* body'. Nancy, *Experience of Freedom*, 72.

³⁸ Derrida, *Rogues*, 59.

³⁹ Ibid., 56-60.

⁴⁰ Wendy Brown, "Sovereign Hesitations" in *Derrida and the Time of the Political* Cheah and Guerlac eds. (London: Duke University Press, 2009), 114-132.

that Derrida's "democracy" relies both on the force of *ipseity* and a conception of freedom defined as 'the faculty of power to do as one pleases'⁴¹ that limits the genuinely emancipatory potential of Derrida's thought. Along similar lines, Rancière argues⁴² that Derrida's commitment to the absolute singularity of every other (encapsulated in the idiomatic phrase *tout autre est tout autre*⁴³) illustrates the impossibility of thinking politically at all. If every other is absolutely other, and thus unsubstitutable by/for any other, the *demos* is incapable of collective, unified action and engagement. Rancière, who defines the *demos* as those that have no particular qualification to rule rather than being ruled, sees substitutability – a condition anathema to Derrida's deconstruction – as fundamental to genuine political engagement. Rancière, like Critchley, limits Derrida's thought to an ethical practice of hospitality, incapable of translation into the political realm. For Miller, Derrida develops an understanding of the subject that is radically opposed to collective or communal engagement. Miller's claim is neatly summarised at the end of his essay "Derrida Enisled:"⁴⁴ 'for Derrida, no isthmus, no bridge, no road, no communication or transfer connects or can ever connect my ensiled self to other selves'.⁴⁵

This understanding of deconstruction suggests that Derrida's position in relation to community is purely negative. Derrida gives us the means by which we might expose how community effaces the singularity of each individual but from here it remains unclear how we can retain a sense of something positive within community, a sense of togetherness that underpins political action. Furthermore, how does this privileging of singularity not collapse into a liberal obsession with the freedom of the unsubstitutable individual? Here I want to assess these issues in a somewhat parenthetical discussion of Derrida's understanding of singularity and its relation to *différance*. I pursue this because it is through this material that we can sense a close alliance between Nancy and Derrida on the question of "originary sociability". And it is here that we can most clearly see the purchase in reading Nancy together with Derrida, giving some substance to the political inference of *différance*.

⁴¹ Derrida, *Rogues*, 22

⁴² Jacques Rancière, "Should Democracy Come? Ethics and Politics in Derrida" in *Derrida and the Time of the Political* ed. Cheah and Guerlac (London: Duke University Press, 2009), 274-288.

⁴³ In *The Gift of Death* David Wills translates this as 'every (one) other is every (bit) other' (see *The Gift of Death*, trans. David Wills (Chicago: Chicago University Press, 1995), 68. This indicates the simultaneous inference of individual absolute singularity *and* that this is a common condition – every other is other, just like everyone else.

⁴⁴ J. Hillis Miller, "Derrida Enisled" in *For Derrida* (New York: New York University Press, 2009), 101-132.

⁴⁵ Miller, *For Derrida*, 132.

Derrida's reticence with community stems not only from a concern for being just with singularity but also a concern for fundamental sociability. So rather than foreclosing the possibility of political community, Derrida, like Nancy, radically re-thinks the notion.

In his reading, Miller suggests that there are good – ethical – reasons for maintaining the absolute solitude of the subject in the world. The notion that every other is absolutely other (and thus unknowably other) informs the scope of our ethical responsibilities. Miller returns to Derrida's phrase, *tout autre est tout autre* to describe this ethical responsibility to be just with the absolute otherness of the other. I want to suggest that Miller's confusion turns on his (mis)translation of *tout autre est tout autre*. Miller translates the phrase as "every other is wholly other".⁴⁶ This differs from David Wills's translation in *The Gift of Death* (the book in which this expression is given its fullest elaboration) which offers, "every (one) other is every (bit) other" as an apt translation.⁴⁷ This difference is significant. In Miller's hands, *tout autre est tout autre* solely becomes an affirmation of the otherness of every other and appears to impute onto Derrida's term a Levinasian sense of a transcendently other Other. In contrast, Wills's translation maintains the undecidability between two possible readings of the phrase; we read it with or without the bracketed words: "every other is every other" or "every one other is every bit other". The latter rendering echoes Miller's translation, suggesting that every particular other is completely other. The former, however, suggests something radically different: the other is the same in their otherness as each other; or, we might say, each other is singularly other, just like everyone else. The significant thing is that Wills's translation stresses the sense of *the same* in Derrida's expression: we are all alike in our otherness.

Miller's rendering of the term fails to be just with the intricacies of Derrida's thought here. By disavowing the alternative reading of the term, Miller stifles the *différential* logic that structures the phrase. The key thing in the notion that *tout autre est tout autre* is that the difference between each other is a *différance*: the unique way in which every other is distinguished from every one else, relies on a multiplicity of differences that is not fully present. I am singularly other in the sense that I am contaminated, in a unique way, by an infinite number of othernesses – my personal history, ethnicity, sexuality, my relations with

⁴⁶ Miller, *For Derrida*, xviii.

⁴⁷ Derrida gives a detailed reading of the various implications of the phrase in *Gift of Death*, 82-85.

family, friends etcetera. So the other can only be defined as an other through reference to an always already differentiation between others. In the same way that “cat” can be distinguished through its implicit reference to “bat,” “sat,” “fat” etcetera, the other is different to another other through an implicit differentiation. These differences, however, can never be wholly present and as such are always deferred. In this sense, the otherness of every other is never present; access to the unique way in which every other is other being foreclosed by the structure of *différance*.⁴⁸

In this sense, then, I would argue that Derrida’s reticence with community is not simply a concern with community’s propensity to efface the singularity of each the other or is, put crudely, an attack on individualism. For Derrida, singularity is born out of a prior but *différential* relation to others. The violence that community effects, then, is a violence against a prior sociability that is a logical prior condition of possibility for singularity. Community then affronts a prior “law of sociability” by circumscribing a more fundamental sense of interrelation or *différance*. In this sense, Derrida re-imagines the “political” implications of community as such. Rather than see a strong sense of community as the *sine qua non* of politics, as Rancière does, Derrida suggests that there is an inchoate sense of the political that precedes the community, an originary *différential* relational.

Nonetheless, Derrida’s critique of community troubles the notion that community can offer a ground for the legitimacy of the law. To say that law has a constitutive relation with “community” (as suggested by Cover and Dworkin), is tantamount to saying that law has a constitutive relation with fraternity: to a logic that reduces members of a collective to *the Same*. Unlike Cover who suggests that jurisgenerative communities are prone to violent encounters with the State, Derrida suggests that there is a violence already at work within such communities, a violence of exclusion and homogeneity. Such jurisgenerative communities are not immune from the threat of fraternalism. The position Derrida pursues in relation to community leaves us without a legitimate ground for law. “Community/fraternity” can never offer a legitimate ground because it is constituted by a violence that effaces singularity and a prior sociability. The line drawing obsessions of jurisdictional techniques are anathema to deconstruction which suggests that any attempt

⁴⁸ For the clearest explication of *différance* see Derrida, “Différance” in *Margins of Philosophy*, trans. Alan Bass (Brighton: Harvester Press, 1982), 3-27.

to ground law with the evocation of community is bound to a certain spirit of totalitarianism.

There are two limitations with this line of thinking. Firstly, though we can read within Derrida a sensitivity for a *différential* notion of relation or “originary sociability” it is neither prominent nor viscous enough in his thought to provide a theoretically grounded account of jurisdiction’s function in bringing law into relation with “community.” It is for this reason that I turn to Nancy. Nancy’s thinking of community and being in common provides a supplement to Derrida, offering an account of community that seeks to accommodate some of Derrida’s concerns with fraternity and the effacement of singularity. Secondly, if we follow my reading of Derrida above, there seems little room to account for anything positive in relation to jurisdiction. Jurisdiction, in this reading, would be solely related to the means by which a (soft) totalitarian spirit or sensibility is established and policed, jurisdiction would be the means by which this originary relation of *différance* is circumscribed. This is a pretty reductive account of jurisdiction and – though, perhaps, accurate in part – it obscures the specular function of jurisdiction that we assessed at the outset of the thesis. Given the centrality of community for Nancy’s philosophy, I want to explore the extent to which we can find a thinking of community and jurisdiction somewhat more sensitive to the role that jurisdiction plays in capturing a sense of the extant but informal practices, interests and relations that precede formal designation.

4.4 Community as inoperative

Nancy’s *The Inoperative Community* should be read in the context of two other significant texts of the same period: Blanchot’s *The Unavowable Community* and Agamben’s *The Coming Community*. These three texts all present community in a way that is not orientated around some common property or identity.⁴⁹ Following Georges Bataille’s attempts to associate community with a non-foundationalist ontology,⁵⁰ community is conceived as a vehicle through which an originary sociability can be identified and recast in a world where such a

⁴⁹ Maurice Blanchot, *The Unavowable Community*, trans., Pierre Jorris (New York: Station Hill Press, 1988); and Giorgio Agamben, *The Coming Community*, trans. Micheal Hardt (Minneapolis: University of Minnesota Press, 2007). As discussed briefly below, Blanchot’s text was a direct response to Nancy’s work on community. Whilst Agamben’s text does not directly engage with Nancy’s thinking, there are clear affinities between the projects.

⁵⁰ See in particular Georges Bataille, “The Psychological Structures of Fascism” in *Visions of Excess*, ed. Allan Stoekl (Minneapolis: University of Minnesota Press, 1985).

sociability has been obscured. These three texts were published between 1986 and 1990 when the worst aberrations of Communist rule in the USSR were well known and at a time when the Soviet project was in terminal decline. The texts share the common political concern of re-imagining the fundamentals of community and communal politics in a way that does not lead to the totalitarian horrors of the period. If, as Sartre commented, 'communism is the unsurpassable horizon of our time'⁵¹ these thinkers desire a reclamation of the fundamentals of this project by recasting and reshaping the modes of our being together. All endeavour to theorize a community that is not united around a closed or unitary sense of identity, rather community is thought of as cohering around (howsoever conceived) singularity and difference.

In its traditional rendering (typified by Dworkin's communities of principle discussed above) community is aligned with a certain essence and identity: we are in such and such a community because of some identifiable trait of belonging. Nancy's *The Inoperative Community*⁵² is a sustained critical engagement with such a conception but unlike Derrida sees some promise in retaining and re-working the notion of "community." For Nancy, this "traditional" notion of community has its roots in Rousseau's nostalgia for a lost sense of communitarianism. Rousseau casts society (state institutions and political regulation) as rupturing an originary community life of self-presence and stable identity:

Rousseau... was perhaps the first thinker of community, or more exactly, the first to experience the question of society as an uneasiness directed towards the community, and as the consciousness of a (perhaps) irreparable rupture in this community.⁵³

Here community is conceived in nostalgic terms whereby a harmonious and intimate communalism has been lost and needs, somehow, to be recaptured; a nostalgia, perhaps redolent of Cover's account. Nancy suggests that this nostalgia lays at the heart of the perennial evocation of some golden by-gone age where a strong sense of political community united members in a common cause.

The task, for Nancy, is to interrupt these myths of essence, foundation and immanence and in so doing to think beyond communitarian models of community.⁵⁴ In this very effort to

⁵¹ Quoted in Nancy, *Inoperative Community*, 1.

⁵² First published as *La Communauté Désœuvrement* in *Aléa* 4 (1983). See Nancy, *Inoperative Community*, 41. The text to which I refer here is the expanded book version which includes the original essay along with four further essays developing the material.

⁵³ Nancy, *Inoperative Community*, 9.

think beyond the traditional parameters of community, Nancy re-appropriates the term for his own ends. Distinguishing between “communion” – a being-together conceived as a unity – and “inoperative community” – a being-together orientated around difference that does not posit a unitary sense of togetherness.⁵⁵ For Nancy, what is often referred to as “community” reveals the totalising and unifying work of “communion” and what is needed is an unearthing of the “inoperative community” that exposes a certain sense of our being together. Nancy works to reveal the constitutive sense of inoperative community covered over by communion’s unifying logic. Nancy contends that it is precisely the withdrawal of the essentialism of communion that is ‘constitutive of “community” itself’.⁵⁶

It is perhaps here that the “inoperativity” of the book’s title comes into focus. Communion would be akin to an *operative* community where an essence is produced and put to work, where a myth of union is propagated and maintained. The “inoperativity” (*désœuvrement*) of community signals something radically different. This idiomatic term implies a range of meanings: idleness, unoccupancy, worklessness or uneventfulness, as well as un-working or rendering inoperative/non-functioning.⁵⁷ Nancy characterises *désœuvrement* (here translated as “unworking”) in the following way:

Community cannot arise from the domain of *work*. One does not produce it, one experiences or one is constituted by it as the experience of finitude. Community understood as a work or through works would presuppose that the common being as such be objectifiable and producible (in sites, persons, buildings, discourses, institutions, symbols: in short, in subjects)... Community necessarily takes place in what Blanchot has called “unworking” [*désœuvrement*] referring to that which, before or beyond the work, withdraws from the

⁵⁴ Ibid., 22.

⁵⁵ Ibid., 12.

⁵⁶ Ibid.

⁵⁷ The English translation of *désœuvrement* has, perhaps unsurprisingly, given rise to much head-scratching. The term is most prominently associated with Blanchot. Here the term is translated (by Pierre Joris in *The Unavowable Community* for example) as “the unworking”. Joris gives a helpful exploration of the term in his “Translator’s Preface” to Blanchot’s book (see Blanchot, *Unavowable Community*, xxi-xxv). In commenting on the difficulties of rendering the term in English, Joris suggests (rather tongue in cheek) that the obstacles of translation perhaps lie in ‘the puritan impulses of Anglo-American culture blocking the very possibility of a positive, active connotation to be attached to the absence of work’ (xxiv). Stefano Franchi traces the term’s origins to Alexandre Kojève who uses the term to describe three novels by Raymond Queneau. This gave rise to a debate over the meaning of *désœuvrement* between Kojève and Bataille. Franchi’s focus is Agamben’s use of the term *inoperosità* (often used in conjunction with French *désœuvrement*) and Franchi finds certain affinities (though not necessarily a synonymy) with Blanchot’s use of the term. See Stefano Franchi, “Passive Politics” *Contretemps* 5 (2004), 33-34. Perhaps the indeterminacy of the term that these authors note performs something of its sense.

work, and which no longer having to do...with production... encounters interruption, fragmentation and suspension.⁵⁸

The inoperative community is not some project with a definable end, a project that *presupposes* the common being of community. However, the “inoperativity” of the community should not be characterised as a kind of inertia or stasis. The inoperative community is a ‘gift to be renewed and communicated’ and whilst not a work is nevertheless a ‘task’.⁵⁹ The inoperativity of community, then, appears as at once the condition of possibility for the operative variant of community (communion) but also the very movement by which this communion is un-done or unravelled.⁶⁰ Inoperative community would name a certain originary sense of being-with others that underpins those operative communities orientated around identity and essence.

Nancy develops this sense of the inoperative community through a reappraisal of an ontology of the “with.” Heidegger’s *Mitsein* is re-worked and presented as an ontology of the “singular plural.”⁶¹ Nancy asserts an ontology that undoes the sovereignty of the *ego* or *autos* whilst retaining a radical sense of singularity. Our singularity can only be revealed through our interpenetration and co-contamination with/by others. The “with” is the bare fact of being: we are beings, Nancy insists, who are intractably *with* others, always ‘exposed to others, always turned toward an other... never facing myself’.⁶² This “with” cannot be essentialised, named or identified, for in naming or essentialising we are caught in a model of communion that the inoperative community exceeds. Appealing to a Derridian lexicon, Stella Gaon describes the inoperative community as ‘arche-community... [and] is thus that spacing (arche-writing) that will have “produced” community, as such, but which itself can never appear’.⁶³

⁵⁸ Nancy, *Inoperative Community*, 31.

⁵⁹ *Ibid.*, 35.

⁶⁰ The emphasis on the *movement* of inoperativity is helpfully pursued by Tataryn and Mulqueen by connecting social movements (specifically Occupy Wall Street) to Nancy’s inoperativity: ‘within the very *action* and *process* of coming together, community and its law are constantly being un-ravelled... [this is] the ongoing movement of what needs to be negotiated and constantly worked through when people come together’. See Anastasia Tataryn and Tara Mulqueen, “Don’t Occupy This Movement: Thinking Law in Social Movements” *Law and Critique* (2012) 23, 286.

⁶¹ Nancy’s ontology of being singular plural is most thoroughly elaborated in *Being Singular Plural*, trans., Robert D Richardson and Anne E O’Byrne (Stanford : Stanford University Press, 2000) 1-99.

⁶² Nancy, *The Inoperative Community*, xxxvii-xxxviii.

⁶³ Stella Gaon, “Communities in Question: Sociality and Solidarity in Nancy and Blanchot” *Journal for Cultural Research*, 9(4) (2005), 395.

4.4.1 In common without community

With the notion of “arche-community” we have perhaps begun to sense an affinity between Derrida and Nancy. Differences, however, clearly remain. Discussing Nancy’s work, Derrida expresses general sympathy for Nancy’s “inoperative communities” but ponders, ‘why call them communities?’⁶⁴ As discussed above, Derrida’s reticence stems from the idea that community can never be conceived in a way that exceeds the logic of *communion*. “Communion” for Derrida would be akin to “fraternisation” where the trait of belonging to a certain community is determined in advance by a pre-existing, quasi-familial relationship.

Any community will always work to determine its parameters, it will always involve a jurisdictional logic, where the law of the community is known to end. This is seen most vividly in the evocation of a fraternity where membership turns on gender, class, initiation etcetera. But, following Derrida, we might assert that even the most open, seemingly hospitable, community perpetuates a similar logic of exclusion, however subtly or unthinkingly.⁶⁵ There is an insidious logic at work in community that even Nancy’s inoperative community fails to avoid. That said there are clear resonances between Derrida and Nancy’s thought here. Both, for example, see community as being in need of deconstruction and, perhaps, more importantly, both undertake this deconstruction in the name of an originary sociability, before or beyond the very possibility of constructed communities. As Derrida asserts: we are caught up, one and another, in a sort of heteronomic and dissymmetrical curving of social space... a curving of the relation to the other prior to all organised *socius*, all *políteia*, all determined ‘government’, *before* all ‘law’.⁶⁶ And as outlined above Derrida shares Nancy’s contention that singularity is conditioned by a more fundamental communality. Community, and singularity, are both made possible by this ‘curving of the relation to the other’ but it is also the very thing that undercuts and exceeds community. There is a “with” that always exceeds the particularity of the community that is both the condition of its possibility and *impossibility*. This speaks directly to the inoperativity that underpins community in Nancy. As we discussed above the

⁶⁴ Jacques Derrida with Maurizio Ferraris, *A Taste for the Secret*, trans. Giacomo Donis (Cambridge: Polity, 2001), 25.

⁶⁵ For an assessment of Derrida’s deconstruction of Rousseau’s nostalgia for a purely peaceful, joyous, originary community in *Of Grammatology* see Drucilla Cornell, *The Philosophy of the Limit*, 42-57. Cornell emphasises that for Derrida community will always imply an originary and inescapable violence born out of the exclusionary logic discussed above.

⁶⁶ Derrida, *Politics of Friendship*, 231.

inoperativity of the community *withdraws*, can never be present itself but is that which conditions the possibility of community.

Emphasising this common account of a sociability that exceeds community, we are bound to re-iterate Derrida's question to Nancy, "why call this community?" If the concern is with the originary "with" that makes community possible, why evoke the notion of "community" at all? As noted above, Nancy's intervention comes at a particular historical juncture where the desire to recapture the language of communism, community and communality and re-cast it anew was palpable. Moreover, the emphasis on the ontological is not without political purchase. In assessing Blanchot's criticisms of Nancy's inoperative community,⁶⁷ Ian James points out that in 'maintaining an ontological perspective... [Nancy presents community] as something that always necessarily *is* by virtue of our shared finitude'⁶⁸ not simply something that is forever deferred for the future or irrecoverably lost to a past golden-age. Echoing this defence of Nancy, Stella Gaon, rightly identifies 'a certain solidarity'⁶⁹ that emerges from Nancy's deconstruction of community that is perhaps less identifiable in Blanchot and Derrida. But Derrida's critique serves as a stark warning about the logic that underpins community. Appealing to community – even in its re-worked, deconstructed and displaced guise – will always evoke a violent exclusionary logic. Perhaps, as Gaon suggests, it would be better to evoke the *certain spirit* of sociability and solidarity that emerges from Nancy (as Derrida evokes a *certain spirit* of Marxism in *Spectres of Marx*⁷⁰) rather than reengage a tired and compromised language of "community" as being able to offer any ground for law.

⁶⁷ Blanchot's *Unavowable Community* was published as a response to Nancy's initial essay-length version of "Inoperative Community". Throughout, Blanchot criticises Nancy's reliance on the ontological register to describe community. Particularly, Blanchot seeks to highlight the extent to which Bataille's conception of "the community of those without community" is *in excesses* of ontology. In this sense, Blanchot evokes an ethical register (in the Levinasian sense) to describe community.

⁶⁸ Ian James, *The Fragmentary Demand: An Introduction to the Philosophy of Jean-Luc Nancy* (Stanford: Stanford University Press, 2006), 192.

⁶⁹ Stella Gaon, "Communities in Question," 401 *et passim*.

⁷⁰ Jacques Derrida, *Spectres of Marx* (London: Routledge, 2003), 62.

Notably, Nancy himself is not averse to such a re-articulation of his project. In “The Confronted Community”⁷¹ Nancy reveals that since the publication of *The Inoperative Community*, he has more acutely noted the ‘dangers inspired by the usage of the word “community”’ among these dangers, he notes the ‘inevitable Christian reference... spiritual and brotherly community, communal community’.⁷² Nancy suggests that given these difficulties he has favoured to focus simply on the “with,” without the need to place this “with” in reference to community or communion. This “with,” he writes, is

almost indistinguishable from the “co-” of community, it brings with it however a clearer indicator of the removal at the heart of proximity and intimacy. The “with” is dry and neutral: neither communion nor atomisation, just sharing and the sharing out of space.⁷³

Perhaps, here Derrida and Nancy appear closest. With “community” effaced, all that remains is a common assertion of our bare (or unqualified) sociability, the evocation of the originary “with” before and beyond the inevitable constructions and determinations of community proper.

If it is here that Derrida and Nancy are closest, we have come full circle. Community – brought to presence by certain jurisdictional practices – seems to be conceived in purely negative terms. If we remove community from the scene entirely, as Nancy seems to suggest by reference to the dry and neutral “with,” we are incapable of accounting for the reality of communities that we encounter, are members of, are terrified by, reject, admire and desire in our everyday lives. To efface community *tout court* and retain only a sense of our “with-ness,” beyond any constructed community, would seem to undermine the political and social efficacy of such “communities,” particularly in relation to jurisdiction, which is the primary means by which community is brought to presence. Through jurisdictional determinations concerning the limits of a community, reparations of past aberrations and exclusions might be possible, jurisdictional limits might protect against certain hegemonic powers, provide a protection against imperial aggression or provide succour for the excluded or ignored. Such concerns are particularly important – as we will see below – in relation to account seeking to address the exclusions that are produced in the formation of political community.

⁷¹ Jean-Luc Nancy, “The Confronted Community,” trans. Amanda Macdonald, *Postcolonial Studies*, (2003) Vol 6, No 1, 23-36. The text was initially commissioned to be published as the preface for an Italian edition of Blanchot’s *The Unavowable Community*.

⁷² Nancy, “Confronted Community,” 31.

⁷³ *Ibid.*, 32.

How, then, do we understand community in a way that retains a sense of juridico-political efficacy and potential but a community that foregrounds rather than effaces the exclusions necessary in community's very constitution? In the following section I suggest that we can develop, through Derrida's logic of autoimmunity, a characterisation of jurisdiction's relation to community as partaking in both the indeterminate and determinate modes of communality discussed so far. On this reading jurisdiction is grounded on a self-referential assertion of community but such a claim is temporary and unstable, always already interrupting the community's claim to presence from within. Through autoimmunity we can account for community's function as (un)grounding law.

4.5 Community and Autoimmunity: Jurisdiction (Un)grounding Law

In this section I want to argue that in Derrida's logic of autoimmunity we find a characterisation of community that works to offer a "ground" for law. Following Nancy and Derrida, however, this "ground" cannot be stable or present. The logic of autoimmunity suggests that community is always already in negotiation with the bare sociability that exceeds it and thus always already compromised, partial and bound to failure and yet it is the very site by which an opening to the future is made possible. Community by holding itself in suspense, as a question, becomes an essential site of political struggle. This site of struggle and the jurisdictional practices to which it gives rise are what (un)grounds community and law. In order to develop this notion of autoimmunity in relation to community, law and jurisdiction, I turn to Derrida's engagement with democracy, where Derrida gives the fullest elaboration of autoimmunity.

4.5.1 Democracy as autoimmune

The idea of autoimmunity is of central importance to Derrida's later work. Biologically, autoimmunity describes a kind of bodily self-destruction whereby the body's immune system produces antibodies or lymphocytes that work against substances naturally present in the body. Whilst clearly inspired by the biological inference, Derrida uses the term to describe a gesture of self-defence or self-preservation of some thing that in fact leads to that thing's destruction. So, to suggest that democracy is autoimmune is to claim that it is threatened *internally* by its very own logic. Such a characterisation of democracy highlights the fact that the democratic process, in order to protect the process itself, must retain the

capacity to suspend democracy. In *Rogues* Derrida cites the example of the elections in Algeria in 1992 where it was predicted that a majority that wanted to reject, or at least restrict, democratic freedoms was forecasted victory in parliamentary elections.⁷⁴ In order to avoid this result the government suspended the elections. So in order to protect democracy, democracy itself was destroyed. This, rather than an aberration or anomaly, for Derrida goes to the very heart of democracy's logic.⁷⁵

This logic of autoimmunity is key to understanding Derrida concept of the "democracy to come" (*démocratie à venir*). Firstly, an autoimmunity is revealed through the relation between democracy and sovereignty. In order for democracy, understood quite literally as the rule (*cratos*) of the people (*demos*), to have any discernable *effect* in ruling it must rely on some form of sovereignty. As Derrida puts it:

As always, these two principles, democracy and sovereignty, are at the same time, but also by turns, inseparable and in contradiction with one another. For democracy to be effective, for it to give rise to a system of law that can carry the day... for it to give rise to an effective power, the *cracy* of the *demos* – of the world *demos* in this case – is required. What is required thus is a sovereignty, a force that is stronger than all the other forces in the world.⁷⁶

The multiplicity of the people who express a desire and capacity to rule themselves, transform themselves into a sovereign "people" or "nation" in order to protect themselves from destruction and provide justification for their rule. In order to achieve some efficacy, therefore, democracy co-opts sovereignty. But in striving to protect itself through sovereignty, democracy suffers from an autoimmune self-destruction. In an attempt to immunise and protect itself from destruction, democracy destroys itself by closing off, unifying and essentialising the multiplicity that enables the formation of democracy in the first place. As Wendy Brown puts it, the originary expression of ipseity 'would be the sovereignty of every "I" or "we" that aspires to rule or govern itself, every entity that acts on

⁷⁴ Derrida, *Rogues*, 33

⁷⁵ The parallels with Giorgio Agamben's work on the exception of the sovereign decision here are clear. Agamben argues that the state of exception – whereby the "normal" rule of law is suspended in favour of the sovereign's executive power – is in fact the norm and constitutes the paradigm of government. Agamben identifies a zone of indistinction between the norm and the exception, in his own way identifying an internal distortion within the logic of sovereignty and democracy. See Giorgio Agamben *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 30-38 and Giorgio Agamben *The State of Exception*, trans. Kevin Attell (Chicago: Chicago University Press, 2005), 1-31.

⁷⁶ Derrida, *Rogues*, 100.

its own behalf'.⁷⁷ But this ordinary expression of self-initiated power is at the very heart of democracy, animating its very *raison d'être*. This self-affirmation of ipseity that animates democracy also forces sovereignty on to the scene, and from here on in democracy and sovereignty are caught in an aporetic double bind that results in democracy's autoimmune self-destruction. Democracy and sovereignty, then, are bound in a destructive clasp that means democracy as such (that is, a democracy without sovereignty) remains an impossibility.

Secondly, Derrida highlights the canonical problem of the relationship between equality and liberty. In *Rogues* Derrida equates equality with the calculable and freedom with the incalculable.⁷⁸ These two necessary but contradictory claims that unite in democracy represent a constitutive fissure at the heart of the democratic. Derrida suggests that freedom is impossible without a concept of equality – the suggestion being that freedom must always take place in relation to limits imposed by others and we must, in theory at least, all be equally free. Democratic freedom only makes sense, then, if everyone within the demos is equally free. So, equality becomes an integral part of freedom and because such equality is inscribed within freedom, equality itself becomes incalculable. The two concepts are intrinsically bound but in an autoimmune relation. Equality confines every singularity to a measurable unit that is infinitely substitutable. Freedom, on the other hand, exceeds this calculation and enables each singularity to be heterogeneous to others. But, for democracy, these two competing factors are mutually dependent – as we suggested liberty must take place in the context of liberty for all – so this represents an internal corruption within the very structure of democracy. To be clear, Derrida is not describing external factors like the distribution of wealth or the inequity of opportunities within a polity that prevent equality or liberty from being realized, rather the focus is the way in which these concepts, because of their co-implication in democracy, corrupt democracy from within.

The autoimmunity of democracy is structured by a *différential* logic. The difference that constitutes democracy is coupled with a logic of deferral whereby democracy's full presence is foreclosed. Returning to the question of sovereignty, in its claim to presence ("this is democracy here-and-now") democracy evokes the sovereignty that calls forth its

⁷⁷ Brown, "Sovereign Hesitations," 119.

⁷⁸ Derrida, *Rogues*, 48.

destruction. Democracy is, then, never fully present in the (sovereign) claim that democracy has arrived or been achieved and is thus always “to come”. It is clear, then, that the “to come” in the democracy to come is not the positing of some horizon of possibility for democracy (as if it were just an *Idea* that we must move towards⁷⁹), rather the “to come” expresses the dislocation that structures the very possibility of democracy from within. As Alex Thomson has pointed out, for Derrida ‘the problem is an internal dehiscence in the concept of democracy itself, not just the distance of modern democracies to democratic ideals’.⁸⁰ In this sense, Thomson suggests, Derrida’s “democracy to come” is in fact more radical than the “radical democracy” of Ernesto Laclau and Chantal Mouffe.⁸¹

Unlike in the biological setting, the metaphor of autoimmunity in this context is not an ill or evil because it:

Enables an exposure to the other, to *what* and to *who* comes – which means that it must remain incalculable. Without autoimmunity, with absolute immunity, nothing would ever happen or arrive... We would no longer expect... any event.⁸²

This is why the democracy to come, in its articulation of the originary flaw within democracy, allows us to think of another space for democracy and new possibilities for the democratic. This contamination of democracy with sovereignty is what gives democracy “play” and opens it to the possibility of infinite recasting, reworking and reiteration. Absolute immunity is equivalent to absolute sovereignty: if democracy were absolutely immune from the parasite of sovereignty it would itself become sovereign. The openness to a new space for politics and democracy is engendered by the emancipatory promise of the *à venir*. Even if deconstruction rejects traditional messiansim, teleology or metaphysics, it

⁷⁹ Derrida is keen to distinguish the democracy to come from the notion of a Kantian Idea (see, *Rogues*, 84-94). However, this clearly does not foreclose the quest for better democracy or more democracy, rather it indicates that that task is endless.

⁸⁰ Alex Thomson, *Deconstruction and Democracy: Derrida’s Politics of Friendship* (London: Continuum, 2005), 49.

⁸¹ Thomson has in mind, particularly, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 2001). Thomson’s suggestion is that Derrida’s thinking of democracy offers a re-thinking of politics, critiquing the limits of democracy itself, whereas Laclau and Mouffe offer an historically situated political theory which avoids this more radical critique. See, Thomson, *Deconstruction and Democracy*, 41-54. In a similar vein, Martin Hägglund has recently argued that Mouffe and Laclau resist the more radical gesture – present in Derrida’s thought – of rejecting the *desire* for a totalized, sovereign political order. Rather their critique is limited to the assertion that such a totalized, sovereign order is impossible. For Hägglund Derrida’s critique of democracy illustrates that such a political order is not only impossible but also *undesirable*. And this represents a more radical position. See Martin Hägglund, *Radical Atheism: Derrida and the Time of Life* (Stanford: Stanford University Press, 2008), 191; 191-205.

⁸² Derrida, *Rogues*, 152.

remains committed to emancipatory politics: 'there is no ethico-political decision or gesture without what I would call a "Yes" to emancipation'.⁸³ This is the double bind Derrida leaves us with: the very possibility of a democracy to come, lies in democracy's exposure to, and corruption by, that which causes its own destruction.

4.5.2 Community as autoimmune

Derrida asserts that community is governed by the same autoimmune logic as democracy.⁸⁴ This notion is briefly mentioned in the essay "Faith and Knowledge" but not given substantive elaboration. There is, he suggests, an automatic – mechanical even – self-destructive logic to the positing of community:

Community as *com-mon auto-immunity*: no community <is possible> that would not cultivate its own autoimmunity, a principle of sacrificial self-destruction ruining the principle of self-protection (that of maintaining its self-integrity intact) and this in view of some sort of invisible and spectral survival. This self-contesting attestation keeps the autoimmune community alive, which is to say, open to something other and more than itself: the other, the future, death, freedom, the coming or the love of the other, the space and the time of a spectralizing messianicity beyond all messianism.⁸⁵

There are two affects of autoimmunity noted here. Firstly, autoimmunity works to destroy community from within. Community is self-destructive, inherently exclusionary and prone to a certain evocation of sovereign autonomy. It is this very exclusionary logic that leads to a positing of a purely immune community that in turn prompts the community's autoimmune self-annihilation. Community can never maintain the immunity that it craves, rather it is bound to autoimmune self-destruction. Autoimmunity in this sense would simply name the logic by which the constitutive outside of community returns to haunt the community and cause its destruction. Importantly, however, this is not an external infection or affliction, the very logic of community itself, governed by jurisdictional techniques that determine the

⁸³ Jacques Derrida, "Remarks on Deconstruction and Pragmatism" in *Deconstruction and Pragmatism*, ed., Chantal Mouffe (London: Routledge, 1996), 82.

⁸⁴ As Derrida reminds us (see Derrida, *Acts of Religion*, 80, n. 27) the notion of immunity is first and foremost of the political and social vocabulary rather than the biological. The common Latin root of *munus* – in both *immunity* and *community* – refers to the obligation owed within a group or a public duty. Immunity (*in-* meaning 'not' and *munis* meaning 'ready to serve') therefore refers to the exemption from such an obligation. The biological meaning of the term was used metaphorically, on the basis of the social or political meaning: *The Oxford English Dictionary* notes that the biological inference is not recorded until the 19th century, the social inference has been in use since the early 17th century. So Derrida's use of the term simply repeats the metaphorical gesture first coined in biology. See *The Oxford English Dictionary* and Miller, *For Derrida*, 124.

⁸⁵ Derrida, *Acts of Religion*, 87.

limit and scope of community, produces the exclusion that compromises community from within.

The expansive conception of sociability discussed in relation to both Nancy and Derrida is what comes to undo the community. Jurisdiction's attempt to limit and close community is always partial and compromised. As discussed above, however, autoimmunity is not absolutely destructive. It is in the very contamination of community by the bare sociability that it seeks to limit and predetermine that community becomes open to an unforeseeable coming of the other. So whilst at once bound to self-destruction, community – *in its very destruction* – becomes the site of an opening to the unconditional “to come” of the event.⁸⁶ We must note, too, that autoimmunity opens the community to the very best *and* the very worst, exposing an unbridgeable fissure in community that at once causes community's destruction and opens the possibility of what is to come (*à venir*). In this sense, the autoimmunity at work within community identifies community itself as a site of political contestation and negotiation rather than a political end, in and of itself. Community, then, cannot be understood as an “ideal” that we try to achieve rather it names the site of negotiation not only *within* the community itself but with the community's other, with its constitutive outside that it desperately tries to be without. To name community as a *telos* or as an answer to a particular political or legal problematic, would be to predetermine and delimit in advance the very possibility of community. “Community,” then, must always hold itself in abeyance and must always already be in negotiation with the bare sociability that is the condition of its (im)possibility.

This logic at work within community would suggest that we cannot do away with community *tout court* and simply appeal to an originary “with” or a bare sociability that exceeds our constructed and partial communities. Such a move – even if desirable – would be impossible. The construction of communities whether in the pursuit of the noblest or most dangerous ends is inevitable. However, by identifying the autoimmunity at work within community Derrida points to the political work necessary in the negotiations of/with community. If the autoimmunity of community opens a space of the *à venir*, a coming of infinite and incalculable possibility, then it must be accompanied by the injunction to

⁸⁶ Ibid., xiv.

calculate and render possible; to work away in the aporia of community to fashion better communities to come.

Such an account of community suggests that it is an opening to the possibility of a deconstructive politics: a politics that will always already hold the community in suspense, as a question, never determining in advance the *co-* that makes community possible. Derrida notes, this may be ‘very little – almost nothing’ but is nonetheless, a community worthy of the name: ‘a community of the question, therefore, within that fragile moment when the question is not yet determined enough for the hypocrisy of an answer to have initiated itself beneath the mask of the question’.⁸⁷ Perhaps it is in this spirit that we should evoke community in assessing its relation to law: as a juridico-political question itself, rather than an answer.

4.5.3 Jurisdiction (un)grounding law

This discussion of community as autoimmune does not try to do without community, rather it accepts that operative communities are bound to be formed. Jurisdictional practices will always affirm the fact of our being together in constructed and operative collectives, inscribing and sustaining the law of the community. But jurisdiction takes on a doubled logic. On the one hand jurisdiction allows community to come to presence. By drawing a collective into relation with the law, jurisdiction makes the limits of a legally sanctioned collective known and visible. In this sense, jurisdiction grounds law in community. But in this very inscription, the community’s impossibility is also revealed. The community’s presence can only come to be through the circumscription of a more primary sense of relation; what Nancy describes as a primordial sharing or “withness” to being and what Derrida might simply refer to as *différance*. In this latter sense, jurisdiction ungrounds law by revealing the partial and always compromised nature of the community which it produces. There is an added difficulty that takes us back to the circularity associated with Dworkin’s communities of principle. If community is never present but only temporary or held in suspense, ungrounded by the very gesture by which it becomes grounded, community itself can offer no “legal” justification for the limit that jurisdiction marks. That which jurisdictional practices efface, expel or silence in the supposedly “natural” relation between law and community will return to haunt this relation, displacing any such claim.

⁸⁷ Derrida, *Writing and Difference*, trans., Alan Bass (London; Routledge, 2008), 98.

Jurisdiction, then, can only bring about a relation between community and law “for the time being,” a relation that is always already open to being rewritten otherwise.

I want to end this discussion of autoimmunity, community and its relation to jurisdiction by brief reference to a case which acutely demonstrates the function of jurisdiction alluded to here. The, now famous, decision in *Mabo v Queensland (No. 2)*,⁸⁸ in which the common law category of native title came to be recognised, the Australian High Court illustrates the dual function of jurisdiction as both grounding and ungrounding the law by bring law into relation with community.

The case concerns the legal status of the acquisition of territory by the British Crown in the Murray Islands. Such acquisition was supposedly guaranteed by either the Legislature of the Colony of Queensland in 1879 or by an Act of Imperial Parliament in 1895. The central legal issue turns on the status of this acquisition, in particular whether either of these mechanisms invested absolute beneficial ownership of land in the Crown.⁸⁹ The claimants argued that the Crown had obtained “radical” or “ultimate” title (which included the right to confer title) but not absolute beneficial title. It was on this basis that the claimants argued that indigenous land rights and interests were a burden on this radical title. It follows that in cases where such indigenous claims had not been properly extinguished, these indigenous beneficial interests subsisted. In accepting this argument, the High Court describe the contrary position pursued by the State of Queensland – that the sovereignty of the Crown over territory, automatically inferred beneficial ownership that extinguished any indigenous claim – as a fallacy.⁹⁰ The decision provides a basis for the common law recognition of indigenous land claims in circumstances where grants of tenure had not effectively extinguished indigenous interests. Subsequent decisions make clear that *Mabo* establishes a regulatory system which administers which indigenous land claims can come to be recognised by the common law. The case traces the jurisdictional reach of the common law by determining the proper boundaries of the Australian political community.

⁸⁸ (1992) 175 CLR.

⁸⁹ *Mabo (No. 2)* (1992) 175 CLR, [20]-[25].

⁹⁰ *Ibid.*, [50]-[51].

Mabo opens a number of contentious questions for law and legal theory.⁹¹ One aspect of the decision, to which I want to turn here, is the way in which the court articulates the relation between law and political community. The decision, in acknowledging the efficacy of indigenous claims, sought to ground a relation between law and community in which the rights and interests of the community were reflected in the legal order to which the community is subject. However, this jurisdictional delimitation, at once opening the law to difference, embracing (however limitedly) indigenous claims to land within a previously colonial legal frame,⁹² also violently demarcates the limits of such claims. The decision, then, seeks to establish the proper (jurisdictional) limits of the common law and the nature of the community to which such law applies. As Stewart Motha rightly identifies, the central question that the court sought to resolve was whether ‘indigenous law and custom, *and thus community*, is consistent with “Australian law”’.⁹³ Implicit in the decision, however, is the need for both community and law to be constitutively open, possible (in principle at least) to being recast beyond its current form. The “grounding” of Australian common law that the case supposedly marks also bears witness to the “ungrounding” of both law and community; the decision is the means by which the autoimmunity of the community and the (un)grounding of law are effected.

In many quarters the decision in *Mabo* has been lauded for at once recognising difference within the common law⁹⁴ and reaffirming the common law as the ultimate foundation of the Australian State.⁹⁵ As Dorsett and McVeigh suggest, the court in *Mabo* grounded its

⁹¹ The key debate turns on the extent to which the case succeeds in addressing Australia’s colonial past. A number of critical approaches have proved helpful: see in particular, Stewart Motha, “The Sovereign Event in a Nation’s Law” *Law and Critique* 13 (2002), 311-338 and Peter Fitzpatrick, “No Higher Duty: *Mabo* and the Failure of Legal Foundation” *Law and Critique* 13 (2002), 232-252. In stressing the jurisdictional nature of the decision, Dorsett and McVeigh’s analysis perhaps comes closest to my own concerns here; see Shaunnagh Dorsett and Shaun McVeigh, “Just So: ‘The Law That Governs Australia is Australian Law’” *Law and Critique* 13 (2002), 289-309. However, rather than view jurisdiction as mediating between sovereignty and law (as well as sovereignty and territory, as they do), I read the jurisdictional significance of the case in relation to community.

⁹² On the extent to which *Mabo* remains wedded to a colonial framework see Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002), 153-186.

⁹³ Stewart Motha, “The Sovereign Event in a Nation’s Law” *Law and Critique* 13 (2002), 333, my emphasis.

⁹⁴ See Paul Patton, “Poststructuralism and the Mabo Debate: Difference, Society and Justice” in eds., Wilson and Yeatman, *Justice and Identity: Antipodean Practices* (Wellington: Bridget Williams Books, 1995) and Michael Detmold, “Law and Difference: Reflections on Mabo’s Case” *Sydney Law Review* 15(2) (199) 159-167.

⁹⁵ Richard Bartlett, “Another Triumph for the Common Law,” *Sydney Law Review* 15 (1993), 178-186.

authority between the common law of Australia and the political community that legitimated the State:

The court did not ground its jurisdiction in natural law: it positioned itself as the guardian of the common law of Australia (*Rechtstand*) and enunciated various ethical positions whose statuses were left open. One interpretation of the judgment in *Mabo (No. 2)* has been that the High Court was taking up the opportunity created by the passing of the Australia Act 1986 (Cth) to re-legitimate the Australian State.⁹⁶

I want to discuss how the decision produces both a ground and a usurpation of that ground in two registers, first in relation to the legal foundation and secondly in relation to community. The court justifies its authority to make the jurisdictional determination that it does in a quintessentially common law effort to mediate between determinate or sovereign law, on the one hand, and extant customs and practices, on the other. As discussed at length in chapter two, the common law asserts its authority from its continual usage and its organic relation to the informal normativity and lore of a community. In the context of *Mabo (No. 2)* the court sought to bring the common law into a harmonious relation with the political community, to make transparent – as the early common lawyers purported to do – this relation. This was no easy task and required the court to bring into relation a reinvented Australian political community that included indigenous practices and interests and the common law principles of tenure and land acquisition that, as Fitzpatrick points out, had denied the very existence of such indigenous claims in the first place.⁹⁷

The difficulty with such a grounding is most pointedly revealed in Brennan J's discussion of the doctrine of *terra nullius*. Brennan J rejects both conquest and cession as grounds for the colonial appropriation of Australian land, favouring instead the notion that Australia was colonised through 'acquisition by settlement'.⁹⁸ It is the notion of *terra nullius* – notably, an enlarged conception of *terra nullius* that conceives land inhabited by indigenous groups as if it were deserted⁹⁹ – that allows for Brennan J's assertion that the 'the common law thus

⁹⁶ Shaunnagh Dorsett and Shaun McVeigh, "Just So: The Law That Governs Australia is Australian Law" *Law and Critique* 13 (2002), 307.

⁹⁷ Peter Fitzpatrick, "No Higher Duty: *Mabo* and the Failure of Legal Foundation" *Law and Critique* 13 (2002), 244.

⁹⁸ *Mabo (No. 2)* (1992) 175 CLR, [24] (Brennan J).

⁹⁹ As Brennan J makes clear the common law definition of *terra nullius* was not concerned with land being uninhabited. Referring to a Privy Council decision of 1919, Brennan explains that the common law held that if indigenous groups were viewed to be 'so low in the scale of social organisation' their presence on newly colonised land was considered inexistent for the purposes of the law. See *Mabo (No. 2)* (1992) 175 CLR, [38]-[39] (Brennan J).

became the common law of all subjects within the colony'.¹⁰⁰ Strikingly, however, Brennan J relies on *terra nullius* to ground the court's authority at the very moment he disavows it, rejecting the doctrine as factually erroneous and contrary to justice. He suggest that, 'the facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England'¹⁰¹ and describes the doctrine of *terra nullius* (the very principle, remember, that underpins the court's authority to assert the Australian common law's ultimate authority) as 'false in fact and unacceptable in our society'.¹⁰² The court, then, attempts to occupy an Archimedean point from which law and community can be brought into relation. But, as the court readily admits, there can be no legal justification for this authority. Brennan J refers approvingly to the position taken by Gibbs J in *New South Wales v The Commonwealth*: 'The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state'.¹⁰³ Because the court's authority ultimately rests on the sovereign acquisition of territory and the – paradoxically (dis)avowed – notion of *terra nullius*, the construction of political community by the court appears to ultimately rely on nothing but fiat or sovereign force. Whilst seeking to justify a ground for the court's decision and thus hoping to clarify, through a revealing tautology, that 'the law that governs Australia is Australian law',¹⁰⁴ Brennan J exposes this ground's undoing. Nonetheless, the decision has the effect of bringing a reimagined Australian national community to presence and though based on a fiction, this is an 'operative and potent fiction'¹⁰⁵ that serves to ground the community in relation to the law. By acknowledging (though in markedly limited ways) the validity of indigenous land claims, an enlarged community is inscribed by law that, as Dorsett and McVeigh argue, offers a 'belated starting point for the negotiation of the settlement of Australia'.¹⁰⁶

Though opening the possibility of reckoning with Australia's colonial past, the decision in *Mabo* also violently limits the scope of such recognition, prescribing strict criteria by which indigenous claims must conform in order to be recognised at law. In this way, *Mabo* creates

¹⁰⁰ *Mabo (No. 2)* (1992) 175 CLR, [36] (Brennan J).

¹⁰¹ *Ibid.*, [38] (Brennan J).

¹⁰² *Ibid.*, [39] (Brennan J).

¹⁰³ (1975) 135 CLR, at 388, quoted in *Mabo (No. 2)* (1992) 175 CLR, [31].

¹⁰⁴ *Mabo (No. 2)* (1992) 175 CLR, [29] (Brennan J).

¹⁰⁵ Fitzpatrick, "No Higher Duty," 245.

¹⁰⁶ Dorsett and McVeigh, "Just So," 308.

the community's limit, inscribing the strict demarcation between those rights and interests that fall within and without the political community of Australia. As set out in *Mabo*, indigenous claims depend on the fulfilment of particular criteria:

Native title to particular land... its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people, who by the those laws and customs, have a connection with the land... Membership of the indigenous group depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among these people.¹⁰⁷

As Motha has persuasively argued, in this move the court constructs an essentialised notion of indigeneity, acting as the final arbiter of what counts as "tradition and custom" for the purposes of a native title claim.¹⁰⁸ In policing the limits of the political community and vetting the "traditional practices" that underpin indigenous land claims, the court dramatically illustrates the jurispathic function of State law discussed above. As Cover tells us, State law kills the plurality of laws associated with jurisgenerative communities, asserting the singularity of one normative system at the expense of all others. As we have discussed in relation to Derrida, however, such delimitation is never fully effective: the 'continuing insistence of the indigenous presence'¹⁰⁹ marks the failure of any full determination of the political community. As with all jurisdictional delimitations, the borders that the *Mabo* principles erect and seek to police are fragile and temporary. It is worth remembering that it is the very fragility of the jurisdictional limit that allows for the re-inscription of these limits in the first place; their temporariness allows for the court to move beyond (however minimally) the preceding colonial determinations.

The "continuing insistence" of indigenous claims underscores the more primary relationality that underpins and exceeds any assertion of limits of community. Fitzpatrick connects the High Court's futile search for the grounds to law with the revelation of a bare fact of our being before the law, suggesting that 'we are all native now'.¹¹⁰ Whilst not effacing the particularity and importance of the indigenous claims in question in *Mabo*,

¹⁰⁷ *Mabo (No. 2)* (1992) 175 CLR [83] (Brennan J).

¹⁰⁸ Stewart Motha, "The Failure of 'Postcolonial' Sovereignty in Australia" *Australian Feminist Law Journal* 22 (2005), 119-124. Motha is particularly concerned with (and strongly critical of) the reception of the *Mabo* framework for establishing native title in *Yorta Yorta Aboriginal Community v State of Victoria* (2002) HCA 58.

¹⁰⁹ Fitzpatrick, "No Higher Duty," 235.

¹¹⁰ *Ibid.*, 252.

Fitzpatrick points to a broader logic at work within modern law: we all find ourselves subject to formal law that is, itself, without (just) foundation. We are, in our bare relationality before the law, circumscribed by the law's (un)grounding violence. *Mabo*, then, speaks to a broader logic at work in any jurisdictional affirmation. The assertion of the proper limits of the community not only acts jurispathically against a plurality of jurisgenerative communities, but circumscribes a more fundamental relationality: our being in common before the law. Jurisdiction, by announcing community's relation with law, must stand outside both law and the community and seek to stabilise or ground this relation. But this "grounding" refers to an always already compromised community that is brought to presence through a circumscription of a more expansive and inoperative sense of being-with. It is this desire to delimit and determine that inscribes the exclusions and paradoxes that return to the law, ungrounding its apparent authority.

The decision in *Mabo* illustrates the dual function of jurisdiction as (un)grounding law. Jurisdiction – naming those techniques that seek to stabilise and cohere a particular community – instigates the autoimmune threat to community. "Community," by announcing its self-presence and its "natural" relation to law, will always exclude and silence the plurality on which it is based. The excluded other, in the very act of inscribing the limits of community, threatens the community's newly crafted limits, haunting the community by virtue of the community's very existence. It is jurisdiction that allows the community to take shape by entering an inchoate (and informal) collective into relation with formal and determinative law. But this very relation, because it cannot offer any ultimate ground for its own authority to bring about such a relation, also ungrounds law.

As evidenced by the rhetoric of the High Court and much of the commentary on the case, *Mabo* is often conceived as providing a sound foundation for Australian law and political community. Clearly, the analysis above challenges such a view but it would also miss the significance of the juridico-political moment at stake in *Mabo* if we read the decision as revealing an absolute failure of grounds. Following Derrida's tentative and wary engagement with community, perhaps we should read *Mabo*, and jurisdiction's function in bringing community to presence more generally, as posing the limits of community as a question, tracing the edges of the community, for the time being. The autoimmune community that is inscribed through the jurisdictional logic assessed here is wholly self-

destructive only if it convinces itself that it can be without an openness to that which it necessarily circumscribes: the singular plurality of being in common. Autoimmunity whilst instigating a threat to community also marks an opening to the future, to the possibility of new worlds and new communities, ungrounded by the very questioning that provides their fragile ground.

Let me end this discussion by suggesting how understanding community as autoimmune might shift the form of jurisdictional practices. As Dorsett and McVeigh argue, *Mabo* charts the way in which two legal orders come into relation. This forces a responsibility on the jurist and jurisprudent to account for the quality, form and conduct of this meeting of laws.¹¹¹ Indigenous law and community is brought into relation with the common law and inherited colonial norms and practices. I would suggest that starting from the acceptance of community's autoimmunity opens a greater possibility of ethically responsible and hospitable conduct in the meeting of laws. This is for two reasons. Firstly, the autoimmunity of community reminds us that community is never hermetically sealed and must remain open to otherness for its very survival, necessitating an openness to community's others. Secondly, the autoimmunity of community, whilst accepting that communities will be posited, policed and brought to presence, in no way seeks to assert their ultimate or natural foundation. The autoimmune community is a community that holds itself as a question, willing and ready to take a new form as it encounters its various others. In seeking to offer a secure ground for the Australian law and community, these attitudes did not prevail in *Mabo*, rather, the court asserted the common law as the only place for such a meeting between common law and indigenous practices and in so doing denigrated both the law and the community of the indigenous groups. The sense of responsibility and the ethical conduct inferred by both Derrida and Nancy's understanding of that which is at stake in community, perhaps, offers a corrective in this regard. In displacing the stability of community a more hospitable encounter between different practices, communities and laws might be possible.

4.6 Conclusion

This chapter has argued that jurisdiction has a constitutive relation with community, bringing community into relation with law. Jurisdiction seeks to bring these two into "proper" relation. The notion of community as a stable and unified collective that is

¹¹¹ Shaunagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012), 98-114.

established through jurisdiction, however, is deeply problematic. Such a community, even as an ideal or aspiration, rests on exclusion and essentialism and is tied to a logic of totalitarianism. Community, in a traditional or nostalgic form, is governed by fraternisation, effaces difference and circumscribes a more primary law of sociability. The jurisdictional practices that enable the formation of such communities – by either declaring the presence of a community or policing the limits of a collective – will always cut across an expansive “with” that overflows and exceeds such determinations. This “with,” however, is something of a vacuity and offers no secure ground for law. In an effort to articulate a sense of political community that neither collapses into such a vacuity nor inevitably leads to fraternity, I followed Derrida in evoking the “community of the question,” governed by the logic of autoimmunity. Jurisdiction, by cutting across a *différential* plane of our being in common, creates the autoimmune community. In this sense, rather than conceive of jurisdiction as simply stabilising community by bring community into relation with determinative law, jurisdiction reveals an inherent instability in this relation. As noted above, the autoimmunity that is inscribed within community represents an opening to the “to come” and infers an ethical responsibility in encountering a community’s others.

Chapter 5

FROM JURISDICTION TO JURISWRITING

One never writes alone (Jean-Luc Nancy)¹

“Write for the sake of truth.”

“Then be a lie, because to write with the truth in mind is to write what is not yet true and perhaps never will be true.” (Maurice Blanchot)²

5.1 Introduction

In the previous chapter we suggested that jurisdiction both grounds and ungrounds law. By drawing a line between those within and without the community, and in so doing seeking to stabilise the relation between community and law, jurisdiction not only limits community but also opens community to a limitlessness. This limitless opening to otherness is engendered by the logic of autoimmunity that jurisdiction sets in motion. By marking the limits of community, community comes to presence but, in its very appearance, is inherently compromised and this internal flaw to community opens it to the “to come” of an unforeseeable future. In this chapter I want to assess the ways in which this opening might be sustained rather than effaced by suggesting that jurisdiction’s function, in expressing the limits and possibilities of legality, can be occupied otherwise. Rather than see this function as being exclusively tied to demarcation and delimitation, such a re-imagining of jurisdiction would involve the expression of legality without reference to the closure and determination commonly associated with the term. Such practices that speak the law otherwise, I name “juriswriting”.

Juriswriting is developed through an engagement with three sources: firstly, the notion of “right-ing” developed by Costas Douzinas and, later, Illan rua Wall, in relation to human rights; secondly, Derrida – and to a lesser extent – Blanchot and Nancy’s meditations on the

¹ Nancy, *The Inoperative Community*, 73.

² Maurice Blanchot, “Literature and the Right to Death” in *The Work of Fire*, trans., Charlotte Mandell (Stanford: Stanford University Press, 1995), 300-344, 312.

philosophical and political significance of writing; and, lastly, the events that dominated, and in many respects reshaped, the political landscape in early 2011, in particular the strategy of occupying public space to affirm the need for political change.

The notion of writing developed by Derrida *et al* and that of right-ing by Douzinas and Wall both offer insights that are in keeping with the theoretical orientation of the thesis. Let me say something briefly, then, about my reliance on recent political events and practices, as this might seem to some a little incongruous with the approach pursued so far.³ My contention is that the occupations of 2011 (and later events still) not only represent a challenge to existing models developed in radical philosophy or social theory – neither of which, arguably, has done an adequate job of accounting for these events⁴ – but also pose important questions to legal theory. In reading these events in relation to jurisdiction, I suggest that these events were legal as much as they were political. I argue that the occupations were expressions of law (of a certain sort) but the extant category of jurisdiction does not provide the wherewithal to account for their form and tenor. I argue that juriswriting comes much closer to capturing the multiplicity, ambiguity and force of these events.

The relationship between theory and praxis is a contentious issue. Too often, perhaps, theorists instrumentalise events to provide support for their theoretical framework or otherwise use their theoretical material to chastise actors when practices or decisions fail to match up to their (the theorists'), preordained, criteria. Rather than seeing the events of 2011 as *ex post facto* “proof” of juriswriting, I want to speculate on the ways in which our understanding of jurisdiction might be re-formed in light of these events. In this sense, I see the occupation of the squares and other public spaces⁵ in 2011 as posing certain questions to law and legal theory and juriswriting as one, tentative, response to this provocation.

³ Of course, we did assess the declaration made by the NTC in Libya in chapter three but the discussion of the events of 2011 need more careful introduction. In our previous discussion we focused on the NTC's declaration, referring primarily to the texts that they published. Here, a broader set of practices and concerns are drawn upon and so some explanation of this turn seems appropriate.

⁴ This is the contention that animates Douzinas's intervention regarding the events surrounding the 2011 “return of history.” For an assessment and critique of contemporary theory's treatment of the 2011 uprisings see Costas Douzinas, *Philosophy and Resistance in the Crisis* (London: Polity, 2013), 176-197.

⁵ Unlike other sites of occupation (Tahrir Square, Syntagma and so on) the Occupy Wall Street movement occupied a privately owned space, Zuccotti Park. As Astra Taylor notes, the occupation

One other issue pursued in the following discussion returns us to the second strand of argument developed in the thesis. By bringing Derrida's notion of (arche-)writing into conversation with concrete political events, I seek to elucidate the political significance of his thought vis-à-vis the law. By engaging Blanchot and Nancy, who both foreground the political in their assessment of writing, I seek to suggest ways in which, what at first blush might appear the most abstract or philosophically demanding aspect to Derrida's thought, in fact speaks directly to political events, practices and concerns. If critical legal studies is entering a period that that (re)engages questions of the political,⁶ the following discussion seeks to address how Derrida and deconstruction have continuing relevance.

5.2 Right-ing

Let us begin to formulate juriswriting by referring to "right-ing" a term first coined by Douzinas in *The End of Human Rights*.⁷ Not only homophonic with the writing that underpins juriswriting, right-ing is substantially imbricated with the logics of "writing," broadly understood. For both Douzinas and Wall right-ing is an engagement or action in the world but one that thinks beyond the existing essentialism and legalism associated with human rights. In this sense right-ing helps mediate between the more abstracted sense of writing that we will discuss at length through Derrida *et al* below and the immediate and material events of 2011. Right-ing not only describes a creative engagement in the world but also offers a non- or post-metaphysical "grounding" for human rights. In this sense then,

was in fact only possible only because of this fact: as the park was privately owned it could – unlike public parks – be open 24 hours a day. See *Occupy! Scenes from Occupied America*, Astra Taylor, Keith Gessen and editors from *n+1*, *Dissent*, *Triple Canopy* and *The New Inquiry*, eds., (London: Verso, 2011), 64.

⁶ Stone, Wall and Douzinas suggest that the chronology of British Critical Legal Studies has been marked by first, aesthetic and textual concerns; secondly, an ethical orientation towards otherness; and is now entering a new period of political reflection. In some respects this represents a return to the very foundations of (American) CLS which sought to explain how law is a form of politics. However, as Stone *et al* make clear, the recent shift towards the political in (British) critical legal thought seeks precisely to engage the question of "the political" (*le politique*) as such rather than assess how law is caught up with day-to-day matters of politics (*la politique*). See Stone, Wall and Douzinas eds., *New Critical Legal Thinking: Law and the Political* (Abingdon: Routledge, 2012), 1-7.

⁷ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000). Through a genealogy of rights – and drawing on a variety of philosophical and theoretical approaches including Lacan, Bloch, Levinas and Derrida – Douzinas's *The End of Human Rights* develops an alternative orientation for human rights. Following, in the main, a Levinasian inspired ethics of alterity, Douzinas develops a philosophically "grounded" account of rights based, not on the essentialism that dominates legal humanism but on ethical opening to otherness, heralding an interruption of extant categories and determinations.

right-ing is *both* imminent to the world, describing certain creative practices or techniques *and* transcending the world, offering some foundational axioms for human rights discourse. As Motha and Zartaloudis point out, Douzinas grounds his conception of human rights on an “immanent-transcendent” radical humanism.⁸ The “immanent-transcendent” or “trans-imminence” of right-ing is crucial to connecting right-ing to writing as such a logic is common to both terms: as we will see in Derrida’s discussion of writing, writing engages a transcendence (that is, arche-writing) but this transcendence is immanent to the materiality of writing itself.

Douzinas’s introduces right-ing in a discussion of non-metaphysical humanism. Read through Heidegger’s critique of Sartre’s “existential humanism,”⁹ Douzinas argues that a reimagined “human rights,” devoid of the individualism and essentialism that pervades their current rendering, might be found in a process of “right-ing”. As he suggests:

Some human rights may be consistent with non-metaphysical humanism. But the overall form of the social bond would change from rights and principles to being-in-common, to the public recognition and protection of the becoming-human with others, a dynamic process which resists all attempts to hold humanity to an essence decided by the representatives of power. To coin a term, this would be a process of “right-ing” and not a series of rights and, like writing, it would open Being to the new and unknown as a condition of its humanity.¹⁰

Right-ing is thus an imminent potential within rights but nonetheless a task that requires creative praxis and intervention. Such interventions that seek to “right” rights, however, do not assert some essential or transcendental “truth” or create new or higher order rights, rather they would involve practices that trouble such closures, allowing, instead, for the coming of a non-metaphysical and anti-foundationalist sense of being-in-common.

Douzinas’s turn to “right-ing” is provoked by two concerns: firstly, the reanimation of the notion of “radical natural right” and secondly, a recognition of the temporality of ontology. Douzinas traces “natural right” through first Greek and then Roman understandings of law, justice and nature in order to examine the ways in which these terms change form in early modernity. A line of thinking from the Sophists to the Stoics, which saw in *physis* (nature) a

⁸ Stewart Motha and Thanos Zartaloudis, “Law, Ethics and the Utopian End of Human Rights” *Social and Legal Studies* 12(2) (2003), 243-268, 256.

⁹ See Martin Heidegger, “Letter on Humanism,” in *Basic Writings* ed. David Farrell Krell (London: Routledge, 2011).

¹⁰ Douzinas, *The End of Human Rights*, 215-216.

means to resist and even overcome *nomos* (law), is privileged in an effort to counter the modern assertion that law, nature and justice are radically distinct.¹¹ Douzinas reminds us that the *physis* of the classical world was not a static or God-given order but was dynamic and shifting, 'never finished or perfected but always on the move'.¹² Set against the law's insistence on stability and fixity, the discovery of the right course or just result, within a shifting natural order, was the business of natural right. In this sense, natural right is methodological, concerned with discovering the just path or decision. As Douzinas claims:

[Natural right] allowed the philosopher to criticise sedimented tradition and the jurist to discover the just solution in the case at hand... Natural right enters the historical agenda, directly or in disguise, every time people struggle to "overthrow all relations in which man is a degraded, enslaved, abandoned or despised being"... For those fighting against injustice and for a society that transcends the present, natural right has been the method and natural law has defined the content of the new.¹³

Douzinas reads this dynamic notion of nature in classical Greek thought together with a post-modern concern with temporality, ontology and the question of humanity. Explaining how right-ing challenges the legal humanism of modernity, Douzinas turns to Heidegger's claim that humanism, by positing an essence for humanity that has some absolute – or at least privileged – value, effaces the open possibility of Being. Metaphysical humanism closes the humanity of the human, restricting it to some present and unchanging value, removing the human from both its historical situation and possibility for radical change. Heidegger provides the seed for a non-metaphysical orientation for human rights. In particular, the fundamental connection between ontology and temporality developed in *Being and Time*, works against the impulse to solidify and determine the value of the human; the key insight being that Being is always in a process of presenting or (echoing Douzinas's formulation of right-ing) "present-ing" itself. Being is in movement, a "coming to be," rather than an already "is." Bringing this thinking into conversation with the legal humanism that underpins contemporary human rights discourse, Douzinas sees a non-metaphysical notion of rights as being connected to a process of right-ing, a conception of rights, then, that rejects the notion of an objectified and static set of indubitable "rights" with their concomitant commitment to both legalism and metaphysics, in favour of a notion of rights connected to the shifting *physis* of the classical world. Rights are reimagined as always being

¹¹ Ibid., 24-68.

¹² Ibid., 44.

¹³ Ibid., 68. Note that the quotation here is from Ernst Bloch, *Natural Law and Human Dignity* trans., D. J. Schmidt (Cambridge, Mass, MIT Press, 1988), xxviii-xxix.

in a state of becoming.

Such a notion of right-ing, grounded in a resistance to *nomos* in the name of a primary but unstable *physis* is picked up and developed by Illan rua Wall in *Human Rights and Constituent Power*.¹⁴ Broadly accepting the Heideggerian insights that Douzinas utilises, Wall supplements the concept by tying it to a notion of “open constituent power.”¹⁵

In classical constitutionalism, the authority to speak the law in the name of the community rests with “constituent power”. This power is ultimately orientated towards the establishment of a new constitutional order and thus has as its *telos* constituted power; that is, the power over a particular polity, invested in a constitutional document or the institutions and practices of the State. Constituent power, in the classical mould, is wedded to identity and essentialism, taking shape in “the people” or “nation” that, when evoked, has the power to topple constituted power in the name of the higher authority that it purports to represent. Drawing on Nancy, Rancière, Agamben *et al*, Wall argues that the power of constituent power lies precisely in the fact that it exceeds the identitarian and essentialist logic commonly associated with the principle. Open constituent power does not claim some transcendent ground for its praxis, nor does it have constituted power as its ultimate goal. Rather, constituent power rests on an inoperative “being-with” that cannot be fully determined or captured. And rather than seeking *potestas* (the power over something), constituent power should be conceived as an expression of open *potentia* (the power, or potential, to do something). Constituent power, in Wall’s formulation, is a strategic and temporary opening of possibility within the polity.

Right-ing, for Wall, is ‘the opening of human rights by constituent power’¹⁶ and names the assertion of a collective resistance to the biopolitics and logics of security that dominate State authority. Such right-ing is involved with the creation of the world but not a “new world” governed by “new rights” but the insistent on the ineluctable ‘invention of the world

¹⁴ Illan rua Wall, *Human Rights and Constituent Power: Without Model or Warranty* (Abingdon: Routledge, 2012).

¹⁵ Illan rua Wall, *Human Rights and Constituent Power*; Wall, “Notes on an “Open” Constituent Power” *Law Culture and the Humanities* (forthcoming), available online (1743872113501840, first published on October 3, 2013), accessed 8 March 2014; Wall, “Tunisia and the Critical Legal Theory of Dissensus” *Law and Critique* 23(3) (2012), 219-236.

¹⁶ Wall, *Human Rights and Constituent Power*, 145.

without model or warranty'.¹⁷ This is an effort (underlining the temporality at stake here) in what we might call, "world-ing" that, rather than aiming to close and determine the world, emphasises the temporality that undercuts such endeavours and in so doing opens "human," "rights" and "world" to possibilities to come (*à venir*).

Wall offers a useful supplement to Douzinas's concept of right-ing. In *The End of Human Rights* – which, it is worth remembering, is written as 'an advanced textbook of legal theory and human rights'¹⁸ and therefore foregrounds exegesis in favour of a detailed articulation the author's own position – Douzinas passes over his neologism pretty quickly, opting to hint at the radical potential in the term rather than explicate it fully. Wall's intervention accepts the thrust of Douzinas's work but, by connecting right-ing to a reimagined notion of constituent power, gives the term a material grounding. Douzinas's tantalising suggestion that right-ing is akin to writing prompts my own intervention. Furthering Wall's effort to bring right-ing into conversation with extant legal categories, beyond human rights, I want to read right-ing together with writing and bring this conversation to bear on the critique of jurisdiction that this thesis has pursued.

5.3 Writing

As intimated above, juriswriting is involved with an engagement in the world. By turning to writing in order to further examine this mode engagement we need to proceed carefully to avoid confusion. Writing in 1947, Jean-Paul Sartre advocates a project of "engaged literature" whereby the writer of prose fiction is seen to be directly acting in the world and engaged in a project of human emancipation.¹⁹ Positioning himself against the "art for art's sake" aestheticism that wilfully disengaged from political struggle, Sartre argues that the writer, as an actor in worldly affairs, has to face up to the responsibility that this entails. The notion of "writing" that Sartre mobilises to make this argument is precisely *not* the one that

¹⁷ Ibid., 143, emphasis in the original. Wall takes this formulation from Philippe Lacoue-Labarthe and Jean-Luc Nancy *Retreating the Political*, ed. Simon Sparks (London: Routledge, 1997), 158.

¹⁸ Douzinas, *The End of Human Rights*, vii.

¹⁹ Jean-Paul Sartre, *What is Literature?* trans., Bernard Frechtman (New York: Philosophical Library, 1949). As Leslie Hill makes clear, Sartre's intervention is directly related to the highly influential reading of Hegel pursued by Alexandre Kojève in the 1940s. In particular, Sartre is concerned to address Kojève's claim that the literary intellectual lives a life devoid of action or authentic creativity. The artist or (literary) writer, in Kojève's scheme lives a life of solitary abstraction from the day-to-day reality of the world, unable to negate and therefore transcend herself. The artist or author is, therefore, something of a fraud. See Leslie Hill, *Blanchot: Extreme Contemporary* (London: Routledge 1997), 103-106.

informs the notion of juriswriting developed in this chapter. A moment spent comparing Sartre's "engaged literature," and his particular understanding of writing that underpins it, with Maurice Blanchot's theory of literature should help to begin to clarify the notion of writing that supports my position. Blanchot's "Literature and the Right to Death" published in 1948, and in direct response to Sartre's position in *What is Literature?*, is something of a proto-deconstructive text that will also help introduce Derrida's notion of writing to which we turn below.

Prose writing, in Sartre's model, is a process of signification, nothing more: 'the art of prose is employed in discourse; its substance is by nature significative... words are first of all not objects but designations for objects'.²⁰ In this sense, writing should be transparent in relation to the world and is little more than a vehicle for expressing particular thoughts and positions, a means by which the "real world" might be articulated and engaged. Writing itself, then, is given no special treatment but is characterised by its ability to convey meaning in precisely the same way as everyday speech. Blanchot's "Literature and the Right to Death" posits a more radical and philosophically sophisticated understanding of the connection between writing and political "engagement." This serves as a marker for the development of juriswriting.

Blanchot follows Hegel's insistence on the centrality of negation for language but sees in literature a redoubling of negation that forecloses the naïve characterisation of writing pursued by Sartre. As Blanchot comments, language depends fundamentally on a suppression or negation of the world: 'for me to be able to say "This woman," I must somehow take her flesh-and-blood reality away from her, cause her to be absent, annihilate her'.²¹ This is a fundamental condition for all language but, for Blanchot, literature is governed by a law of double negation. There is no "real world" which is negated in literature as this world is already annihilated through the author's use of the fictional register. As Blanchot suggests, in literature,

The whole [world] does not present itself as real but as fictional, that is, precisely as a whole, as everything: perspective of the world, grasp of that *imaginary* point where the world can

²⁰ Sartre, *What is Literature?*, 20. Sartre suggests a radical difference between poetry and prose: poetry treats words as objects themselves whereas prose is purely representational. Sartre effectively dismisses poetry as having no direct engagement with the world.

²¹ Maurice Blanchot, "Literature and the Right to Death," 322. This essay was originally published in 1948 and then reproduced for the book-length *The Work of Fire*, published a year later.

be seen in its entirety. What we are talking about, then, is a view of the world which realises itself as unreal using language's own peculiar reality.²²

The fictional world, then, is markedly different from the real one. In fact it is precisely the indeterminacy between the real and the fictional that gives literary writing its effect. The double negation within literary language suggests that fiction has no necessary relation to reality. Blanchot interrupts the simple relation that Sartre posits between author and the world: rather than obliging a responsibility for the author's representation of the world and engagement with it, writing also names a fundamental *disengagement* or suspension of the world. Writing is not cast as a purely representational medium that works as a transparent film through which we might act in the world, rather, by attending to the materiality of writing itself, Blanchot complicates this relation. The author cannot approach the world *directly*, because of the double negation of literary language writing can only ever *indirectly* give an impression or sense of the world.²³ The obliqueness of the literary text in relation to the world privileges the materiality of writing, underscoring how language not only represents the world but in itself (that is, by its rhythm, tone and inference) expresses something. There is, then, in writing, an undecidability between language's expressive and representational modes, we cannot know whether a word, 'is a thing or means that thing'.²⁴ In short, there is no simply "engaged literature," the literary form expresses a fundamental ambiguity in relation to both the world and the author's relation to the text; literature, as Blanchot comments, 'denies the substance of what it represents'.²⁵

If literature represents a doubly detached relation to the world, literary language must be self-referential. Instead of referring to objects in the world, literary language can only refer to itself, that is to other words that themselves have been doubly negated in relation to the world. In this sense, writing disrupts the stability between subject (author) and world, relying on a play of differences to convey meaning or sense. Furthermore, Blanchot's position underlines the fact that literature persists in the radical absence of an author. The

²² Blanchot, "Literature and the Right to Death," 339.

²³ On the distinction between sense and signification, Nancy helps. For Nancy, signification names a closure of representation: a word (signifier) refers to a concept or thing (signified) and names a representational loop, a closure of meaning and the world. Sense, in contrast, is in excess of signification and refers to the way in which the world presents itself, prior to the closure of signification. Sense, what has become, Nancy's key term, is closely related to Derrida's *différance*. See Jean-Luc Nancy, *The Sense of the World*, trans., Jeffery S. Librett (Minneapolis: University of Minnesota Press, 1997), 1-29, *et passim*.

²⁴ Blanchot, "Literature and the Right to Death," 341-342.

²⁵ *Ibid.*, 310.

logic that doubly removes the literary text from the world, must itself remove or negate the author herself from the text.

Underlying Blanchot's position is a rethinking of the function of death, signaled by the essay's title. For Blanchot death not only names the ultimate possibility of our existence, a mark of our absolute finitude which structures our lives, but so too is death related to a fundamental impossibility; an impossibility of a "self" ever dying. As Blanchot comments: 'when I die, by ceasing to be a man I also cease to be mortal, I am no longer capable of dying... no longer death but the impossibility of dying'.²⁶ Death, then, can only be experienced as other and by the other, never by a (sovereign) self. In this sense, death becomes an impossibility; as Blanchot puts in *The Writing of the Disaster*, "I" dies before being born'.²⁷ Writing, by troubling the author/world binary, participates in this "death" by divorcing the author from the world. As Blanchot comments, 'language is the life that endures death and maintains itself within it'.²⁸ The sovereign "self" of the author – presupposed in the "engaged literature" model – is displaced in Blanchot's account. Literature, then, names an opening to otherness and a challenge to the sovereignty of the self.

Blanchot's concern, in "Literature and the Right to Death" at least, is with literary writing. Unlike Sartre, he sees literature as encompassing both poetry and prose; in fact, we might read Blanchot's position as seeking to illustrate how a certain poetry (with its reliance on an expressive linguistic mode) persists within prose, which, by contrast is largely representational. In this examination of literature, however, Blanchot reveals a logic that itself seems fundamental to all writing. It is a fuller account of this logic of writing, in the most general terms, that Derrida pursues in the 1960s and to which we turn in a moment. What, though, of the politics of writing? Is Blanchot's insistence on a surface play and ambiguity at work within literature suggesting that literature can never be engaged or

²⁶ Ibid., 337.

²⁷ Maurice Blanchot, *The Writing of the Disaster*, trans., Ann Smock (Lincoln: University of Nebraska Press, 1995), 101.

²⁸ Ibid., 336. Blanchot's reading of death is offered as a supplement to Heidegger's characterisation of *Dasein* as being orientated toward death. For Heidegger, death is *Dasein*'s ultimate horizon, the outermost possibility that should – in an authentically lived existence – condition our being in the world. As Hill observes, however, in Blanchot death becomes 'abruptly inverted', death signifies an ultimate impossibility rather than possibility. As Hill comments, Blanchot sees death as 'a limitless non-experience of the impossibility of dying'. Hill, *Blanchot: Extreme Contemporary*, 113.

political? Quite the opposite. Instead of insisting on the political responsibility of the author, Blanchot suggests that the very medium of writing itself imposes a more radical sense of politicisation. By effacing the sovereign author/actor that must be held “responsible” for her actions in the world, Blanchot’s account of literature underscores the sociability of writing and reading. Writing is an exposure to otherness that cannot be captured by a monadic self. In this sense, literature is radically political. Like the “death” to which it is a witness, writing opens a sense of our being-with-others in the world and by creating worlds that have no necessary relation to the real one, point to possibilities beyond our current predicament. We might characterise the difference between Blanchot and Sartre by reference to the distinction between politics and the political. Sartre’s engaged literature calls for a politics (*la politique*) of writing, seeking to hold the writer to account for their actions, decisions and worldly responsibility. Blanchot, in contrast, suggests that in literature we might find a retreatment of the political (*le politique*). Seen more clearly in his fictional writings, Blanchot demonstrates how writing is capable of the continual interruption of seemingly closed or “natural” categories such as narrative, character, authorial voice and so on. And this itself is not without political import: Blanchot’s account of writing provokes a thinking of politics without – or at least beyond current understandings of – author, reader and narrative. By focusing on the peculiarities of writing itself, rather than assuming that writing takes the same form as any other communication, Blanchot is able to sketch, *avant la lettre*, a deconstructive politics.

5.3.1 Writing, text, interpretation

In *Of Grammatology* Derrida develops a way of reading the entirety of Western thought by rethinking “writing” in terms not unfamiliar to Blanchot. Reflecting both an early twentieth century turn in philosophy to language²⁹ and a more contemporary scriptural turn in

²⁹ The “linguistic turn” was felt in both analytic and continental schools of philosophy. The key contention – discernable in as diverse a set of figures as Wittgenstein, Heidegger, Russell, Lacan, Carnap *et al* – is that language itself is centrally important to philosophy. Putting things rather brutally, before the turn to language Western philosophy had been framed in terms of accounting for a relation between subject and object and understanding the conditions of possibility for knowledge, experience, ontology etc. In this scheme language is purely incidental to philosophy. The linguistic turn, in its various guises, took language to be absolutely essential to the very possibility of making claims about the world or our experience of it. Language, then, rather simply being shaped by the subject (and incidental to claims made about the world or experience) is crucial to shaping the very parameters of thought. Language, then, becomes the conditions of possibility for philosophy at all, constructing the limits of that which can be known. For example, for Wittgenstein, the form of language is analogous to the form of the world and for Heidegger, it is “language that speaks man”

science, media and culture,³⁰ Derrida articulates a notion of “writing” as a fundamental condition of possibility for all communication, thought and, indeed, life itself. Writing, or *arche-writing*, comes to signify a general movement of difference and deferral that allows for speech, scriptural writing, and political engagement to take place. By reading a number of thinkers central to the Western tradition, Derrida demonstrates how this notion of arche-writing has subsisted within the history of philosophy but has been covered over and ignored by a series of metaphysical presuppositions, particularly with regards to temporal presence. Writing has been historically mistrusted by philosophy because of its “gap” (both spatial and temporal) from the supposedly “present” thoughts of the subject. The everyday notion of writing – or what Derrida, calls the ‘vulgar conception of writing’³¹ – has been considered to be a signifier of a signifier: a representation of a more primary representation (i.e. speech), which in turn represents thought. Writing is thus doubly removed from the primacy of the subject’s present thoughts and intentions. This downgrading of writing rests on a metaphysical assumption about the possibility of a purely “present” moment which has sovereign authority. Following our discussions of iterability and performativity in chapter three, we have already seen that Derrida carefully examines how this notion of a purely present moment is a fallacy. What appears as if “present” rests on a prior movement of difference and deferral that ceaselessly interrupts any such claim. Writing is never present to itself but is always already dislocated. More precisely, writing relies on a logic of “spacing” (*espacement*). Spacing is the becoming-time of space and the becoming-space of time³² and refers to the very condition of possibility for writing. Writing can only function through a spacing out or spatial organisation of signs or marks and this engages temporality because every mark can neither be inscribed nor perceived in a single instant; writing is constituted by a fundamental deferral.

rather than *vice versa*. See Wittgenstein, *The Tractatus*, *passim*, and Martin Heidegger, *Poetry, Language, Thought*, trans., Albert Hofstadter (New York: HarperCollins, 197), 185-208.

³⁰ From the beginning of the *Grammatology* Derrida highlights the way in which “writing” has come to signify much more than the everyday sense of the term. DNA is described as a “code” or a genetic “script” and cybernetic theory accounts for the operations within systems as a generalized “program” of writing or inscription. What interests Derrida here is the way in which writing has become generalized to mean much more than its everyday designation. It is the prevalence, as well as the expanded meaning, of writing as “inscription in general” that opens the possibility of Derrida’s assessment of a science of writing, or “grammatology.” See Jacques Derrida, *Of Grammatology*, trans. G. Spivak (Baltimore: Johns Hopkins University Press, 1997), 8-9.

³¹ Derrida, *Of Grammatology*, 56.

³² *Ibid.*, 68 and Jacques Derrida, *Speech and Phenomena*, trans., David B. Allison (Evanston: Northwestern University Press, 1973), 85-86.

While Derrida's understanding of writing responds to a twentieth century turn to language and the pervasiveness of script and text in contemporary culture, the common law's own turn to the written form occurs much earlier. As Peter Goodrich has carefully charted, the early modern transformation of the common law from a largely oral culture to an 'equally codified but materially distinct'³³ written form, prompts a shift in the nature of legal knowledge, interpretation and understanding. The shift in focus from the oral to the written proceeded hand in glove with an increasingly static and determinate conception of legality. As Goodrich suggests, 'the peripatetic tradition of the common law that came to specific places and applied its particular knowledges as a travelling law is replaced by a system of sedentary courts and available written texts'.³⁴ This move from the nomadic to the static, the oral to the textual, prefigures a turn to hermeneutic concerns in legal scholarship and it is in this register that Derrida's understanding of writing, text and interpretation has been fruitfully deployed.

Writing against Gadamer's philosophical hermeneutics, Douzinas and Warrington argue that Derrida's early work on writing and language offers much needed vigilance against the closures heralded by the hermeneutic approach.³⁵ Gadamer asserts the possibility of a true interpretation of text through a dialogical process in which the reader moves between her own historically conditioned prejudices³⁶ and the historical horizon in which a text was written. This is connected to a movement at work within any interpretative act between a particular part – a sentence, stanza or case – and a projected whole; an inchoate but continually evolving understanding of a novel, poem or area of law. It is through this movement (in which the part is put into conversation with the whole) along with the merging of the two horizons of text and reader that meaning comes to be determined. Gadamer – whose philosophical project, like Derrida's, is concerned with a reception and furtherance of Heidegger's thought – shares a number of concerns with Derrida's

³³ Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Winfield and Nicholson, 1990), 114 *et passim*.

³⁴ Goodrich, *Languages of Law*, 116.

³⁵ Costas Douzinas and Ronnie Warrington, *Postmodern Jurisprudence: The Law of text in the Texts of Law* (London: Routledge, 1991), 29-51. On Gadamer's philosophical hermeneutics, see Hans-Georg Gadamer, *Truth and Method* (London: Continuum, 2004).

³⁶ Prejudice in this context should not be understood in the common negative sense but closer to the notion of pre- or fore-judgment.

philosophy³⁷ but as Douzinas and Warrington illustrate, Derrida's turn to writing eschews the conservatism of Gadamer's approach.

Underpinning Derrida's thinking is a radical scepticism about the possibility of interpretative stability, particularly evidenced in writing. This is connected to the temporal structure of performativity examined in the third chapter. Here we suggested that the performative was temporally out of joint. Writing, more generally, is structured by a similar temporal logic: as with the performative, there is no "now" of writing. The force and efficacy of writing lies precisely in its temporal ambivalence; a written mark or sign captures the past *in the very moment* that it is inscribed. As Derrida comments:

Time is the economy of a system of writing... Traces thus produce the space of their inscription only by acceding to the period of their erasure. From the beginning, in the "present" of their first impression, they are constituted by the double force of repetition and erasure, legibility and illegibility.³⁸

Writing, in a purely formal sense, is a means of sustaining something through the passage of time. The everyday notion of writing illustrates this point: the reams of notes that clutter my desk are effective only in that they "store" previous thoughts or events, bearing a trace of a past idea, desire, intention and so on. But, in the very moment of penning such a note, writing opens up a sense of the unforeseeable future: the writing may be erased or (more likely, given my spider-like scrawl) be unreadable; the significance originally intended may have become superfluous; or the reader (whether me or an other) may read the words in a radically different context and ascribe to them a meaning that was not originally intended.

Legal interpretation, necessitated by the early modern shift from an oral to a scriptural legal culture, seeks to obscure these structural possibilities within writing. As Balkin suggests, the traditional form of interpretation with a focus on authorial intention or historicism is a 'logocentric theory'.³⁹ Written law is always open to the possibility of failing the transparency of meaning it so desperately craves. As Douzinas and Warrington put it, Derrida's thinking infers that,

³⁷ On the question of the relationship between Gadamer and Derrida, see, *Dialogue and Deconstruction: The Gadamer-Derrida Encounter*, Diane P. Michelfelder and Richard E. Palmer eds., (New York: State University of New York Press).

³⁸ Jacques Derrida, *Writing and Difference*, trans., Alan Bass (London: Routledge, 2008), 284.

³⁹ J. M. Balkin, "Deconstructive Practice and Legal Theory" *The Yale Law Journal* 96(4) (1987), 784.

All traditional concerns of hermeneutics must be challenged and rethought. Authorship and intentionality cannot be used as principles of unity and coherence of a text, or the totality of work. The text, a collection of traces, is cut off from whoever penned it, torn away from its moorings... The law of repetition fissures intention, makes it disjointed, internally divided, never fully present to the actor.⁴⁰

It is these concerns that prompt Goodrich's study of the particular written legal form that emerge in the early modern period, suggesting that legal scholarship needs to focus on the specific textual and rhetorical organisation of the law to reveal its underlying logics and ideologies.⁴¹ Deconstruction forces legal scholars to reckon with the textuality of the law, to understand in its play of traces, how legal meaning is not only produced but always already destabilised by the very movement that produces it.

These early efforts in bringing Derrida's thought into conversation with the law sought to highlight the contingency and fluidity of legal texts. Acts of legal interpretation that sought to resolve tensions by stabilising the play of textuality should be exposed as remaining wedded – like Gadmer's hermeneutics – to a metaphysics that elides difference. The approach outlined here in relation to Goodrich, Douzinas and Warrington, *et al*, casts deconstruction as a form of negative critique: Derrida's thinking is used to show how the law fails to match up with its proclaimed coherence and how philosophical hermeneutics falls short of providing a sound method for legal interpretation.

The way in which Derrida's notion of writing can be deployed in this way is significant and serves as an important reminder of the persistent opening always already at work in texts. However, there is another aspect to the Derrida's thought that I want to pursue in what follows. This returns us to the trans-immanence of right-ing discussed above. In *Writing and Difference*, Derrida privileges particular authors, styles and modes of writing that, rather than obscure arche-writing (as the law does) foreground this play and difference on which writing relies. It is Derrida's suggestion that certain modes of creative practice are privileged points at which we might glimpse the necessity of arche-writing that particularly intrigues me as it suggests that Derrida's thought can be deployed in a positive as well as negative register. Rather than simply undermining the apparent stability of legal texts, I argue that Derrida's notions arche-writing, textuality and interpretation inform how we

⁴⁰ Douzinas and Warrington, *Postmodern Jurisprudence*, 49.

⁴¹ Goodrich, *Languages of Law*, 114.

might creatively act in the world, particular within the register of jurisdiction. Writing, then, can be thought of as an immanent inscription or taking of space that, in its very operation, engages a transcendence, opening this immanence to a beyond or radically otherwise. Given Derrida's insights vis-à-vis writing, how might we imagine styles of inscription and spacing that rather than disavow *différance*, foreground its movement? How might we imagine a *différential* praxis?

As the previous chapters have already intimated, I suggest that there is an isomorphism between arche-writing (a generalised sense of movement, difference and deferral) and a sense of the law as originary being-in-common or sociability. As arche-writing is the condition of possibility for language in general, so the law of originary sociability is the condition of possibility for positive law. This "law of sociability" is tied to a reimagining of our *ius commune* and has been expanded on through our readings of Kafka, the early modern common law thinkers, Austin and performativity, and Nancy's engagement with community. In each instance we have explored the ways in which jurisdiction mediates between a positive and determinate sense of the law and a more primary notion of difference and deferral that implicates self and other in a shifting web of relations. I want suggest that through creative interventions and practices within the register of jurisdiction, we can glimpse the more primary "law of sociability" that has been our concern throughout the thesis so far. Such strategies, I call "juriswriting." Rather, like Jabès, Artaud and others, I want to explore strategies of writing – but a "writing" that exceeds the notion of marks on a page – in order to show how this law (of originary sociability) can be expressed or performed in order to displace and disrupt efforts at closure, positivism and juridification. A shift to the register of (arche)writing displaces our common conception of jurisdiction and allows for a strategic occupation of this principle in an effort to interrupt and challenge the law's narrative of stability, sovereignty and determination.

In order to develop a theoretically grounded conception of juriswriting we must move slowly. Before bringing "writing" into relation with jurisdiction and law, let me first lay out some key commitments Derrida makes in relation to writing as a creative practice.

5.3.2 Writing and the plasticity of closure

In conversation with Maurizio Ferraris, Derrida suggests that none of the three books of 1967 – *Speech and Phenomena*, *Writing and Difference* and *Of Grammatology* – should be considered a book in and of itself:

Not one of them is a book, not one of them was planned as a book... *Writing and Difference* is a collection of texts dating from 1962-3 to 1967; *Of Grammatology* is made up of two heterogeneous passages put together somewhat artificially (the first part and the part on Rousseau), and this logic of supplementarity is a logic of incompleteness; as for *Speech and Phenomena*, that was a conference presentation... it was anything but a project for a book.⁴²

The book signifies an ontic reality, a finite closure, a completed project. The notion of arche-writing examined in these texts works to challenge the very concept of the book, suggesting that at work within a written text is a movement that exceeds and interrupts the closure that the book appears to represent. Firstly, the three texts can only “properly” be understood in their interrelation, they rely on a logic of supplementarity with one text both standing in for and adding to the others. Secondly, arche-writing – the orientating point for all these texts – names a movement that escapes the ontic register. As we have already noted arche-writing has no determinable origin, it likewise can be said to have no end; arche-writing is always already underway.⁴³ Arche-writing with its interminable shifting of difference and deferral disavows the closure associated with the book, rather it opens a possibility beyond the ontic, the present and the closed.

Nonetheless, there is a tension between “the book” and “writing.” The decentring and play associated with Derrida’s expansive notion of writing has to take place in relation to and in excess of the closure that the book designates. Pure play or pure *différance* would be akin to the vacuity discussed in the previous chapter in relation to community. Writing conceived of as a trace of differences and as capable of positing a beyond of closure and ontic

⁴² Jacques Derrida and Maurizio Ferraris, *A Taste for the Secret*, trans., Giacomo Donis (Cambridge: Polity, 2002), 29-30. As Alan Bass points out in the “Translator’s Introduction” to *Writing and Difference* there are various ways in which these three texts could be organised. *Writing and Difference* could be inserted after the first part of the *Grammatology* dealing with Saussure’s linguistics. Equally, however, the whole of the *Grammatology* could be inserted into *Writing and Difference* after the first six essays of that collection. *Speech and Phenomena* could be added as a long footnote to either the first half of the *Grammatology* or *Writing and Difference*. See *Writing and Difference*, ix-xii.

⁴³ The arche- of arche-writing, etymologically referring to the beginning or founding principle, is ironically appropriated by Derrida. Writing, as we suggested above, is commonly thought to be secondary (a representation of a representation) and so arche-writing paradoxically refers to, “originary-representation.”

determination must take place *in relation to such closure*. This play between the possibility of a writing beyond the book and the insistence of the book as closure is brilliantly performed in the final essay of *Writing and Difference*. Typically books end with a conclusion that ties together themes and offers a final statement on the argument developed throughout the foregoing. The final chapter of *Writing and Difference* – “Ellipsis” – performs the ambivalent relation between play and closure that Derrida has argued is typified by writing.⁴⁴ In a sense then “Ellipsis” is (not) more than a conclusion: it occupies the place of the conclusion but writes it otherwise.

The chapter’s title refers not only to the literary device – “...” – that indicates the removal of superfluous words from a sentence but also suggests the geometrical figure of the ellipse, a circle that does not attain complete or perfect closure.⁴⁵ Derrida here is emphasising both a logic of incompleteness and supplementarity, key to writing, but also a plasticity to closure itself. Writing takes place within a metaphysics of closure and presence – the “epoch of the book” where writing is conditioned by certain established formal norms and conventions – but writing is not absolutely contained by that closure. As he comments at the close of the essay:

The beyond of the closure of the book is neither to be awaited nor to be refound. It is *there*, but out there, *beyond*, within repetition, but eluding us there. It is there like the shadow of the book, the third party between the hands holding the book, the deferral within the now of writing, the distance between the book and the book, that other hand.⁴⁶

Writing, as an inchoate opening to a beyond of metaphysics, is already at work within the putative closure of the book. In fact, Derrida is only able to offer a glimpse of the beyond of the book and to nod to a notion of writing that he sees as offering vistas beyond a restrictive metaphysics by precisely relying on the closure of book itself. We only detect the irony and playfulness of this occupation of the “conclusion” with an “ellipsis” because of our ready acceptance of the closed parameters erected and policed by a metaphysics that Derrida wants to gesture beyond. We are returned here to the strategies associated with right-ing

⁴⁴ “Ellipsis” uses Edmund Jabès’s *The Book of Questions* as a foil for (re)presenting the themes of writing and difference discussed throughout the book. Jabès is the subject of an earlier essay in the collection – “Edmund Jabès and the Question of the Book” – and Derrida clearly finds in Jabès’s aphoristic, elliptical and challenging style a writing that confronts writing (in the ontic or classical register) itself. It is the doubled work of writing that particularly interested Derrida, a sense of writing as both closure and opening.

⁴⁵ An ellipse is a figure produced when an oblique plane intersects a cone and does not touch the cone’s base.

⁴⁶ Derrida, *Writing and Difference*, 378.

which occupies human rights discourse – with its concomitant essentialisms and reductionisms – with an aim to test the plasticity of its concepts. Both writing and right-ing involve the strategic occupation of extant (and closed) forms in order to open them beyond their current determinations. Derrida's evocation of an opening of writing beyond the closure of the book suggests that a thinking of the *beyond* or of the *radically otherwise* is a question of testing a plasticity *within* rather than a utopian positing *beyond*. Derrida's final chapter – and the trope of writing that is developed throughout the 1967 texts – is so effective because it occupies an extant form but finds within it plasticity and play. Writing names a tentative reaching out to a beyond that is inscribed within, inscribed in such a way that closure is stretched or distorted, like a circle that fails perfection, flattened into an ellipse.

5.3.3 The staging of writing

Arche-writing does not present itself as such but is only seen through traces within writing itself. We cannot hold onto arche-writing because it is always already at work within texts and things. Derrida is interested, however, in the way that writing seeks to frame or stage itself as if it were not affected by this prior play of difference. The play between the indeterminate register of arche-writing and the apparently stable and determinate form of writing suggests the work of pretence and dissimulation. Writing acts *as if* it were free from arche-writing, seeking to be as close as possible to the presence and sovereignty of speech. Derrida connects the pretence within writing to the theatre, suggesting that writing appears as if on a stage, neatly framed with actors speaking the lines of a present and authorised script. Such an appearance of writing, however, hides arche-writing, the play of difference and deferral that allows for the staging to be in place at all. Writing, then, is always exceeded by arche-writing so that any staging will always be incomplete; there can be no final or proper staging of writing because writing is the 'stage of history and the play of the world',⁴⁷ a play (in both senses of movement and theatrical performance) that disrupts any imposed script, stage or authorial voice.

⁴⁷ Ibid., 287.

These themes of staging, writing and dissimulation are taken up in Derrida's engagement with Antonin Artaud's experiments with the "theatre of cruelty".⁴⁸ Derrida is intrigued by Artaud's efforts to imagine a staging and performance of drama beyond the onto-theological impositions commonly associated with the theatre. As Derrida suggests, the theatre is dominated by a particular theology:

An author-creator who, absent and from afar, is armed with a text and keeps watch over, assembles, regulates the time or the meaning of representation, letting this latter *represent* him... he lets representations represent him through representatives, directors or actors, enslaved interpreters... who faithfully execute the providential designs of the "master."⁴⁹

The theatre of cruelty is an impossible notion of theatre that escapes all of these restrictions. Artaud argues that the theatre with these strict hierarchies of representation – and with audiences as passive, sedentary and static participants in this oppressive economy – has become, 'if not the absolute negation of theatre... certainly its *perversion*'.⁵⁰ In its place, then, Artaud imagines a theatre released from this theological distortion to allow for a more vital and creative theatre 'born out of a kind of organised anarchy'.⁵¹

Derrida reads Artaud's manifesto for the theatre of cruelty as an attack on the closure of representation. Significantly, the theatre Artaud advocates would no longer rely on a metaphysics of presence: 'the stage will no longer operate as the repetition of a *present*, will no longer *re-present* a present that would exist elsewhere and prior to it'.⁵² This disavowal of representation, however, is not absolute. Rather, Derrida suggests that Artaud points to a

⁴⁸ Artaud develops the notion of "the theatre of cruelty" in a number of letters, lectures and essays. The key texts (written between 1931 and 1937) are collected in *Le Théâtre et son Double* (first published in 1938). As Edward Scheer comments, 'Artaud employs several important images that function as metonyms for his theatre of cruelty, since it resists any positivist definition or formulation... *cruelty* is Artaud's name for an encounter which leaves no category secure'. See Edward Scheer ed., *Antonin Artaud: A Critical Reader* (London: Routledge, 2004), 3-7. The "cruelty" of Antonin's theatre is perhaps best understood in connection to the Latin root *crudus* meaning raw or rough. The theatre of cruelty is a theatre that seeks to reveal something of the bareness of life without or beyond the strictures of text, stage and set. As Brian Singleton argues, in this sense, Artaud could be understood as developing an "anti-theatre." See Claude Schumacher and Brian Singleton trans. and ed., *Artaud on Theatre* (London: Methuen Drama, 2001), xi. Nonetheless, there is something importantly violent in Artaud's strategy, as Derrida suggests the "cruelty" is connected to a desire to kill the father figure of God-author-director: 'the origin of theatre, such as it must be restored, is the hand lifted against the abusive wielder of the logos, against the father, against the God of a stage'. See Derrida, *Writing and Difference*, 301.

⁴⁹ Derrida, *Writing and Difference*, 296.

⁵⁰ Antonin Artaud, *The Theatre and its Double*, trans. Mary Caroline Richards (New York: Grove Press, 1958), 106, quoted in Derrida, *Writing and Difference*, 298-299.

⁵¹ Artaud, *The Theatre and its Double*, 52, quoted in Derrida, *Writing and Difference*, 314.

⁵² Derrida, *Writing and Difference*, 299.

notion – akin to Derrida’s arche-writing – of “originary representation.” This would refer to a radicalisation of representation itself, suggesting that there are only ever re-presentations and thus no primary *presentation* or *presence* to which a representation could refer. By embracing this logic of “originary representation” Artaud seeks to divorce theatre from a vertical operation of power, evidenced by the author-director-actor chain, and allow for a theatre of the happening or event. Such a theatre, for Derrida, would be a “writing” in the fullest sense of the term: ‘an experience which produces its own space’⁵³ without the god-author, possessing a sovereign intention, controlling the staging of this writing/performance.

In an important sense, Artaud’s theatre of cruelty is impossible. Just as arche-writing can only be sensed within and up against a metaphysics of presence and closure, theatrical performance and representation will itself always be caught within certain hierarchies, determinations and fixities. In performance itself, no doubt, new norms of presentation will emerge; as Jacques Rancière comments, theatre engages ‘a set of perceptions, gestures and attitudes that *precede and perform* laws and political institutions’.⁵⁴ Artaud’s vision, then, could never be fully realised, in fact the notion of “full realisation” conforms to the very authorial or directorial power that Artaud is writing against. The theatre of cruelty, then, is “(im)possible” in that it can only be sensed through degrees of failure. It is this (im)possibility of arche-writing, evident in Artaud’s efforts, that also occupies Derrida in “Freud and the Scene of Writing” where Freud is cast as a performer of writing, a writer who is at a certain limit where arche-writing or generalised difference is sensed within his writing itself: ‘Freud performs for us the scene of writing. Like all those who write. And like all who know how to write well, he let the scene duplicate, repeat, betray itself within the scene’.⁵⁵

Derrida’s interest in both Freud and Artaud lies in their testing of writing’s limits. Both writers display a generalised performative element to writing and life but it is, precisely, a performance without script or director. There is, as Derrida says in relation to Freud, ‘no

⁵³ Ibid.

⁵⁴ Jacques Rancière, *The Emancipated Spectator*, trans., Gregory Elliott (London: Verso, 2011), 6. My emphasis.

⁵⁵ Derrida, *Writing and Difference*, 288.

unconscious truth [or text] to be rediscovered by virtue of having been written elsewhere'.⁵⁶ This absence of an orientating text inspires a kind of creative acting-out as "writing." Writing, so understood, is a creative staging or performance that both creates and denies its own scene, a writing that threatens to undo itself in its very inscription, a fragile and temporary creative praxis. Writing's force comes from its ability to speak from a neutral place, it names a happening without sovereign sanction.⁵⁷

5.3.4 Writing (as) the law

Right-ing directly engages law: "rights" its object and site of intervention. Writing, on the other hand, appears – at first blush at least – removed from law. Though legal texts and procedures utilise the written form, the play, ambiguity and anarchism of differences associated with Derrida's notion of writing seems far removed from (human) rights and their concomitant obligations and norms. Following our discussion of how Derrida's notion of writing has been deployed within legal hermeneutics, we might suggest that writing is itself contra-legal, precisely involved in sedition and subversion; as Blanchot comments, 'writing is the greatest violence, for it transgresses the law, every law, and also its own'.⁵⁸ But in this transgression of the law (the written and readable law of *lex*) is not another law shown? A law that co-opts writer and reader in a quiet solidarity, opening an experience of our bare condition of being-with?

For Nancy, writing is engaged in precisely this opening to another law. Nancy's notion of "literary communism," developed in *The Inoperative Community*, privileges literature's ability to expose the ontological register of "being singular plural". Like Derrida, for Nancy, the potential of "literature," or "writing," lies in its ability to interrupt or suspend myths of foundation, totality or closure. Importantly, writing opens selves to otherness, to an originary being-in-common. Nancy's "literary communism" does not suggest that certain literary forms or tropes tell of being singular plural, rather Nancy suggests that in literature or writing being-in-common as being singular plural shows itself. As Nancy suggests:

⁵⁶ Ibid., 265.

⁵⁷ The notion of the neutral voice of narrative is particularly important for Blanchot. See Maurice Blanchot, *The Infinite Conversation*, trans. Susan Hanson (Minneapolis: University of Minnesota Press, 2013), 379-387. As Derrida comments, Blanchot's "narrative voice" is 'a neutral voice that speaks the work from out of this place without a place, where the work is silent. The placeless place where the work is silent: a silent voice, then, withdrawn into its "aphony"'. See Jacques Derrida, "Living On" in *Parages* (Stanford: Stanford University Press, 2011), 103-191, 130.

⁵⁸ Blanchot, *The Infinite Conversation*, xii.

Being-in-common is literary, that is, if we can attempt to say that it has its very being in “literature”... then what “literature” will have to designate is this being itself... in itself. In other words, it would designate that singular ontological quality that gives being in common, that does not hold it in reserve, before or after community, as an essence... but that rather makes for a being that is only when shared in common.⁵⁹

“Literature,” in the sense outlined here, exposes a certain originary law of being social. This sociality is another law, the “other law” that has animated our account of jurisdiction. Rather than expressing the law’s capacity to divide and delimit, writing exposes a law of relation to which we are abandoned.

But so too is writing insubordinate in the face of the law, able to interrupt and suspend legal norms and categories. With this conception of writing we are close to Derrida’s evocation of a law that ‘not only exceeds or contradicts law but also... [has] such a strange relation to it that it may just as well demand law as exclude it’.⁶⁰ Writing has an ambivalent relation to legality, exposing its own law (of sociability) at the very moment it interrupts the law (of interdiction and prohibition) by exceeding the borders that are erected in its name. Blanchot describes this ambivalence in the following terms:

The Law is writing itself, writing that has renounced the exteriority of interdiction [*l’entre-dire*] in order to designate the place of the interdict. The illegitimacy of writing, always refractory in relation to the Law, hides the asymmetrical illegitimacy of the Law in relation to writing.⁶¹

Blanchot alludes here to the paradox of constitutionalism whereby the law comes to be through an act of a-legality. The law is written, but as Blanchot intimates, this law is illegitimate, it ‘takes the place of the interdict’ rather than seeing the interdiction as external to it. In this sense writing is co-opted to write a new law. However, there is an ‘asymmetrical illegitimacy of the Law in relation to writing’. Writing exceeds the law and, though utilised in making it known and understood, remains insubordinate or ‘refractory’ in relation the law. Writing, then, privileges rather than discards the sense of law that we have throughout, posited as the condition of possibility for the positive law. Writing holds in place, within the law – and indeed essential to it – a prior movement that is insubordinate and inoperative. In this sense, writing, in the very moment of inscription, both marks and exceeds its own limit. But, crucially, this excess is *within* writing itself, as Leslie Hill puts it,

⁵⁹ Nancy, *Inoperative Community*, 64.

⁶⁰ Derrida, “Force of Law,” 233.

⁶¹ Blanchot, *The Infinite Conversation*, 431.

'it is the limitedness of writing that is key to its limitlessness'.⁶²

5.4 Towards Juriswriting

Writing, as we have discussed it so far, is liminal. Writing itself is internally divided, naming both a generalised movement of difference and deferral (i.e. arche-writing) that is the condition of possibility for speech, writing and life, but also a creative practice of inscription which in some sense reveals these very conditions of possibility. Writing takes place at the limit of representation, troubling representation itself by putting the *presence* of *representation* into question. Let me begin to flesh out juriswriting by underscoring those aspects to writing that have been central to our discussion above.

Firstly, following both Blanchot and Derrida, writing interrupts the author-reader-text relation. Writing's force comes from a horizontal rather than vertical operation: sense is produced through a plane of differences that cannot be reduced to the sovereign intention of a reader or writer. This disavowal of the sovereignty of the writer/reader co-implicates self and other. In fact, through writing/reading we are bound to recognise "the other" always already haunting "the self." Secondly, writing involves the taking of place: it is the becoming-time of space and the becoming-space of time. Writing is a material occupation of space but one that engages a temporality beyond the purely immanent or present. The writing that interests Derrida most is that which foregrounds and plays with its own temporality, that is, its own absences and lacunas, performing the deferral central to its own material form. Thirdly, writing is positioned against the limit. Writing, in fact, must engage the limit, that is, it must limit itself within the closure of certain ontic forms: the book, the law, the theatre, the thesis. But given the trans-immanence of writing (that is, a transcendence inscribed within the immanent form of writing), this positioning against closure reveals a plasticity to existing forms. Whether this is seen in Artaud's testing of the form of theatre or Derrida's experiments with supplementarity vis-à-vis the book, writing is both creative and insubordinate, naming a movement that is the condition of possibility for change. Lastly, writing is bound up with performance or a kind of "acting out." Arche-writing is subsumed within scriptural writing and so scriptural writing is always engaged in a sort of pretence, acting as if its writing were absolutely transparent with regards to the world or ideas. Writing is a question of staging (and thus, again, of limits) but, as Derrida

⁶² Hill, *Extreme Contemporary*, 97.

tells us writing can betray itself in its staging, redoubling the scene of its own making, holding itself as a question of representation rather than claiming to effectively represent the world once and for all.

How, then, does this conception of writing inform jurisdiction? As we noted at the outset of the thesis, jurisdiction is the law's expressive register. It names those techniques through which the law comes to be known, visible, heard and understood. Beyond efforts to make visible certain territorial distinctions and demarcations, we have discussed how jurisdiction requires the manipulation of both narrative and performative modes. Jurisdiction reveals law through the fashioning of narratives of continuity as well through the eruption of a performative declaration. In both cases we have suggested that we need to account for a prior register in order to explain the efficacy of these techniques. And it is here that we have stressed the significance of a lawful register, before the (positive) law, as the condition of possibility for law. As we have maintained throughout, jurisdiction fulfils a doubled function of declaration and reflection; there is a prior movement of "law" at work that jurisdiction seeks to reflect as law itself. In the jurisdictional moment, however, this prior law gets transformed because the informal and inoperative web of relations that it names becomes formalised, present and – supposedly – stable. In this important sense, jurisdiction names a staging or performance in the very sense of staging discussed above in relation to writing. Jurisdiction tells of law *as if* it were always already extant. It hides this prior movement of "law" that is its condition of possibility and participates in a fantasy of presence and purity. Our efforts so far have been to reveal this logic and stress the significance of the prior informal and inoperative "law" that jurisdiction seeks vainly to do without.

These strategies are analogous with Derrida's own vis-à-vis writing. In questioning the supposed purity of the jurisdictional moment and seeking to account for another movement at work beneath, beyond or before the present and posited law, we have undertaken an exploration of, what we might call, an "arche-law" that is the condition of possibility for law. But as the discussions in *Writing and Difference* make clear, there are strategies of creative praxis that work to, rather than efface arche-writing, underline and play with this expansive notion of difference, and in so doing undermine the apparent expulsion or submersion of *différance*. My contention is that similar strategies can be found with regards to the law. Jurisdiction can be occupied otherwise, as Jabès, Artaud, Freud, Blanchot *et al* occupy

writing otherwise. In privileging rather than effacing the arche-law of originary sociability, such an occupation of jurisdiction might displace narratives of closure, purity and presence and, in so doing, test the plasticity of the legal form.

Such strategies I call juriswriting. This names those practices that efface the mobilisation of a sovereign goal, party, or leader, and, instead, embrace the happening of the text and revel in the way that sense that is produced through a multiplicity of horizontal differences. Like right-ing, juriswriting takes a non-metaphysical being-in-common as its founding axiom. Juriswriting involves the taking of space but inscribing into this spacing a temporality of becoming, an opening to difference and the future-to-come (*à venir*). Juriswriting is an acting out in the world, conditioned by a certain performativity; its mode of expression would be that of *showing* rather than *telling*. Blanchot's comments apropos the events of May 1968 in this regard are telling, the uprising, he claims, was 'without project... saying was more important than what was said'.⁶³ But juriswriting does not refer to creative practices of intervention that suspend the sovereignty of authorship or the hegemony of representation alone. Juriswriting also privileges the lawful register exposed through writing practices: a sociality or communism of the literary, where self is necessarily opened to other. The relationality that this names, prefigures the (positive) law and, indeed, exceeds and resists it. Juriswriting seeks to right the law through an occupation of the function of jurisdiction. Rather than declaring the limits of the (positive) law or announcing the "proper" relation between law and the political community, juriswriting *shows* or *performs* an other law, a law of inoperative being-with, that is – as Derrida intimates – perhaps the very essence of the law.⁶⁴

Through an occupation of, and intervention within, the law's jurisdictional register, juriswriting names a strategy of creative practice that seeks to expose this "other law" that is always already at work within the putative rigidity of the extant legal form. Such a "writing" of the law would seek to expose a more fundamental "law" that comes before the law, a law of sharing and fracture, through which self and other are always already co-implicated. Such practices seek, through creative praxis and intervention, to right the (positive) law by writing this law of sociability anew.

⁶³ Maurice Blanchot, *The Unavowable Community*, 30.

⁶⁴ Derrida, *The Politics of Friendship*, 231.

5.5 Juriswriting in the Squares

The global Occupy movement; revolutions and uprisings in North Africa; the Spanish *indignados*; the ‘stasis syntagma’⁶⁵ in Athens; the later mass mobilisations of the Gezi Park protests and the uncanny “standing man” in Taksim square;⁶⁶ as well as the insurrection and riots on the streets of English cities all interrupted and challenged existing structures of power in the wake of the financial crash of 2008. The number of protests, rallies and gatherings that were sparked by the collapse of the financial system are too numerous to mention and are imbricated within a much wider series of protests and insurrections from the events in the Paris *banlieues* of 2005 to the Athens riots of 2008 and owe much of their politics to the anti-globalisation movements of the early 2000s.⁶⁷ The economic conditions that precipitated the crash, State policies pursued in its aftermath, and the political procedures that were mobilised in the occupations all fall beyond the scope of our present concerns.⁶⁸ Each of the eruptions of 2011 have a unique heritage, and need to be situated in relation to particular national political disputes animated, in part at least, by local grievances. However, ‘the systematic pressures and the political reactions are similar’⁶⁹ in the various cases; despite the differences, certain communalities remain. Reflecting on how these events inform the theoretical commitments developed in this chapter, I focus on the strategy that was common to many of the uprisings of 2011: the occupation of public space. I assess how these events, and this strategy in particular, force us to reconsider the category

⁶⁵ See Costas Douzinas, “Stasis Syntagma: The Names and Types of Resistance” in *New Critical Legal Thinking* Matthew Stone, Illan rua Wall and Costas Douzinas eds., (Abingdon: Routledge, 2012), 32-45.

⁶⁶ On the standing man protest (led by performance artist Erdem Gündüz) see Karim Talibi, “Turkey’s ‘Standing Man’ protest By Erdem Gündüz Spreads Across the Country,” *Huffington Post*, 18 June 2013. And on the Gezi protest in general see, Basak Ertür, “The Gezi Uprising and Particularities of Discontent” *Law and Critique* 25(1) (2014), 3-7.

⁶⁷ On the difficulty of connecting recent events, particularly Tahrir square, to a wider set of political actions, especially to the “colour revolutions” of Eastern Europe, see Zeinab Abul-Magd, “Occupying Tahrir Square: The Myths and the Realities of the Egyptian Revolution” *The South Atlantic Quarterly* 111(3) (2012), 565-572.

⁶⁸ The multifarious uprisings of 2011 have given rise to a wealth of literature. For full accounts of political and – to a lesser extent – economic analysis see, Slavoj Žižek, *The Year of Dreaming Dangerously* (London: Verso, 2012); Alain Badiou, *The Rebirth of History: Times of Riots and Uprisings* (London: Verso, 2012); Costas Douzinas, *Philosophy and Resistance in the Crisis* (London: Polity, 2013); Paul Mason, *Why It’s Kicking Off Everywhere: The New Global Revolutions* (London: Verso, 2012). The question of the legal significance of 2011 events has received less attention. However, a number of themes are pursued in: *New Critical Legal Thinking* Matthew Stone, Illan rua Wall and Costas Douzinas eds., (Abingdon: Routledge, 2012) and “Theory Engaged: Perspectives of Discontent” Matthews and Tzanakopoulos eds., *Law and Critique*, 23(3) (2012), 183-311.

⁶⁹ Costas Douzinas, *Philosophy and Resistance in the Crisis* (London: Polity, 2013), 9.

of jurisdiction. By reading them in relation to the notion of writing discussed above, I hope to reflect on how juriswriting both speaks to and is itself informed by these events.

If jurisdiction makes the positive law known by determining its limits and scope, the “law” expressed or written in the squares privileged, rather than effaced, that inoperative and elusive sense of being-with that is the condition of possibility for the (positive) law. The squares *wrote the law* or, we might say that they *performed the law as writing*. The law’s claim to represent the people and speak with the authority of the community was co-opted by the “motley crews” that gathered in the squares. These gatherings were jurisdictional in nature but they did not declare or announce the positive law, sign a constitutional text or delimit the scope of the community’s authority.⁷⁰ A different “law” was written. In embracing difference and deferring teleological commitments to constituted power, these events – as much of the journalistic coverage at the time testified⁷¹ – hovered between the readable and the unreadable, deriving their force from a resistance to final determination and definition. These events were writing the law, exposing another law, a “law” of a more primary, but inchoate, sense of sociability.

The occupations, then, performed a politics of writing, nascent in Blanchot’s critique of Sartre discussed above, and developed in Derrida’s later interventions in *Writing and Difference*. Writing, in the sense that we have been using it throughout, does not refer exclusively to the scriptural form of marks on a page. Writing names a movement of creative practice that opens singular selves to others, it names those practices, devoid of sovereignty and stable authorship that take the risk of playing with the ‘aleatory force of absence’.⁷²

⁷⁰ It should be noted that some of the occupations did publish a “declaration” or a set of “demands”. The strategy of juriswriting that interests me here is the taking space and place that prefigures and exceeds these declarations. For the Occupy Wall Street declaration see, <http://www.nycga.net/resources/documents/declaration/>. First published 29 September 2011. Accessed online, 25 May 2014. The Occupy London movement made a similar announcement charting a series of demands and concerns. See, Murray Wardop, “Occupy Protesters: Activists Deliver Charter of Grievances” *Daily Telegraph*. <http://www.telegraph.co.uk/news/uknews/8831851/Occupy-protests-activists-deliver-charter-of-grievances.html>. First published 17 October 2011. Accessed 25 May 2014. Significantly, the declarations themselves were not the centrepieces of occupations and did not, in fact, receive much media coverage.

⁷¹ As Douzinas and Mason note, the uprisings in 2011 were largely unforeseen by the media and other commentators, when they did arrive were greeted with bewilderment. See Costas Douzinas, *Philosophy and Resistance in the Crisis* (London: Polity, 2013), 8 and Mason, *Why It’s Kicking Off*, 25-40.

⁷² Blanchot, *The Infinite Conversation*, xii

Significantly, the squares deferred from the proclamation or declaration of demands, they *showed* rather than *told* of their opposition to the status quo. This “writing” was a liberating force but not in Sartre’s sense of engaging the freedom of a political actor, rather in the sense of exposing those involved and observers alike to ‘possibilities that are entirely other’, to an ‘anonymous, distracted, deferred, and dispersed way of being in relation’.⁷³

Douzinias counter-poses the occupation of Syntagma Square with the uprisings in Athens of December 2008 in the following terms:

December was characterised by time, Syntagma by place, December by transience, Syntagma by permanence, December by (limited) violence, Syntagma by the repudiation of violence, December by mobility, Syntagma by a static presence. Syntagma’s relationship to space and time differed from December.⁷⁴

The relative permanence of the occupations, compared to other forms of protests that are done and dusted within a matter of hours, is key to understanding their relation to writing. Those involved took the space of the squares, they were engaged in a spacing out (*éspacement*) of bodies that sought to leave a trace of presence rather than a march or procession that vanishes soon after it starts. This is not to say that the squares were without dynamism or movement from within, the occupations were characterised by a hive of activity from media centres to libraries, food stalls to open meetings and debates. But their relative stasis provided a stage on which a sense of being-together before the law could be performed. Like writing, the occupations were enduring but temporary,⁷⁵ permanent but, from their inception, threatened by erasure.

Judith Butler’s remarks at the Zuccotti Park occupation make clear, the occupations were less concerned to declare or make present a particular position, than they were to perform or “act out” a sense of resistance: ‘we are coming together as bodies in alliance, in the street, in the square... we’re standing here together making democracy, *enacting* the phrase “we the people”’.⁷⁶ This enactment is associated with the mobilisation of force. In *Writing and Difference* writing is read together with Freud’s notion of breaching [*Bahnung*],⁷⁷ suggesting

⁷³ Ibid.

⁷⁴ Douzinias, *Philosophy and Resistance in the Crisis*, 150

⁷⁵ Adam Ramadan, “From Tahrir to the World: The Camp as a Political Public Space” *European Urban and Regional Studies* 20(1) (2012), 145-149, 146.

⁷⁶ Judith Butler, “Remarks at Zuccotti Park, October 23 2011” in *Occupy!*, 193. My emphasis.

⁷⁷ Derrida, *Writing and Difference*, 251-258.

that writing (and *éspacement*) is not without force, potency or *potentia*. It is only through such force that writing can leave a mark and affirm itself through the passage of time. Juriswriting too is connected to this “breaching” or forcing associated with writing. Jodi Dean’s comments on Occupy Wall Street are here apposite:

[The occupation] asserts a gap by forcing a presence. This forcing is more than simply of people into places where they do not belong... It’s a forcing of collectivity over individualism, the combined power of a group that disrupts a space rarely accommodating of individuals.⁷⁸

Freud’s term *Bahnung* is derived from *Bahn*, meaning road or way. Derrida’s translation of *Bahnung* is *frayage*, an idiomatic term suggesting a power capable of breaching or breaking through something but also having a generative inference, referring to the change brought about by the breach. As Alan Bass notes the term “breaching” – which, intriguingly, has the inference of something illicit or unsanctioned, as in the breach of a contract or legal duty – should be read as implying not only the force that opens a path but also the space opened by it.⁷⁹ This seems particularly relevant in relation to the occupations: in the act of forcing or breaching a new path, a new space was created (or written) for political action.

By embracing a plurality of voices and concerns rather than articulating a single “party line”⁸⁰ and by embracing the mode of performance and enactment rather than declaration, the occupations, like Artaud’s theatre of cruelty that inspires Derrida’s account of writing, did without the hierarchies associated with author, actor, director and script. Writing, and by extension juriswriting, as Blanchot reminds us is always interrupting itself, performing a ‘speech without reference to unity’ a speaking ‘only to interrupt oneself’.⁸¹ The lack of authorship and vertical authority allowed for a greater plurality in the occupations. As Wall suggests of the protest and resistance in Tunisia ‘there was no *condition* of belonging to the protests’:⁸² there was no pre-determined identity to which participants had to conform, no party or ethnicity of which one had to be a member. There was no script to which the actors/activists were wedded, the script was being written in its performance. The

⁷⁸ Jodi Dean, “Claiming Division, Naming a Wrong” in *Occupy!*, 91-92.

⁷⁹ Derrida, *Writing and Difference*, see the translator’s note, 426, n. 2

⁸⁰ One prominent banner in Syntagma Square captured the attitude to parties in the squares: “Party member, we want you here, but not your party”. See Douzinas, *Philosophy and Resistance*, 159.

⁸¹ Blanchot, *The Infinite Conversation*, 78-79.

⁸² Illan rua Wall, “A Different Constituent Power: Agamben and Tunisia” in *New Critical Legal Thinking* Matthew Stone, Illan rua Wall and Costas Douzinas eds. (Abingdon: Routledge, 2012), 64. Wall contrasts this with the situation in Libya where the resistance against Gadhafi was quickly racialised where “darker skinned” inhabitants were expelled or executed, blamed for being mercenaries.

occupations themselves were internally differentiated but this did not restrict their impact. As Douzinas notes there was an “upper” and a “lower” square in Syntagma, with differing strategies in play in the two zones.⁸³ And in Tharir, Abul-Magd stresses the plurality of sites for rest, health care, as well as front-line assault.⁸⁴ In part at least, the force of the occupations lay in their multiplicity and difference, they were marked by a disavowal of signification and representation and the affirmation of sense, performance and writing. Whilst not making exacting demands, they nonetheless gave a *sense* of resistance and democracy. As Nancy suggests, ‘sense is... not the “signified” or the “message”: it is *that something like the transmission of a “message” should be possible*.⁸⁵ The content (in terms of explicit demands and so on) of the occupations was less important than creating the space where communication of particular positions might be possible. In this way the occupations privileged rather than ignored the *différential* set of relations that is their condition of possibility. In this way we might see the juriswriting of the squares as the *khora* for the legal, the staging of a being-together that resists final determination, exceeding the (positive) law that might be written in its aftermath.

The loci of the occupations as well as their modes of resistance is significant. As Ramadan suggests, regarding Tahrir Square, the protest camp occupied existing monuments and memorials of the State and succeeded in transforming these sites into a locus of radical potential:

The camp at Tahrir Square was an enclave of another order, an assemblage of people, politics and technologies set apart from its surroundings and embodying its own value system. However, it was an enclave *in* those surroundings; it made holes in state sovereignty and spilled out.⁸⁶

The occupations were engaged, then, in the kind of trans-immanence so crucial to both writing and right-ing. By lodging themselves within the existing parameters of public space, the protests were immanent to the State but in their politics and aspirations they transcended the existing regimes of power, reaching out towards a new order based on social and economic justice. The encampments were located in the heart of financial districts (Zuccotti Park, the London Stock Exchange and later St Paul’s Cathedral) or in amongst the buildings associated with State power (Tahrir, Syntagma, Puerta del Sol) giving

⁸³ See, Douzinas, *Philosophy and Resistance*, 168-170.

⁸⁴ Zeinab Abul-Magd, “Occupying Tahrir Square,” 566.

⁸⁵ Nancy, *The Sense of the World*, 118.

⁸⁶ Ramadan, “From Tahrir to the World,” 146.

rise to unusual encounters between activists and bankers, radicals and government employees. The strategy of occupation tested the plasticity of State authority. In Egypt this proved to be explosive,⁸⁷ elsewhere radical change has not been effected but nonetheless certain traces of 2011 remain.⁸⁸

The events of 2011 pose important questions about how we theorise jurisdiction. To give the expression of law over to juridical authority alone is to cede legality from its foundations in social and communal practice. As we have argued from the outset, jurisdiction's efficacy depends on some constitutive relation with informal legal relations: the *ius* of people being-together. The squares of 2011 could well have given rise to declarations of the traditional sort, placing themselves within a long tradition of pronouncing the righteousness, independence or integrity of their cause. The deferral from this kind of jurisdictional logic is intriguing. By suspending firm lines of demarcation, the occupations opened themselves to the play of their own text, to the ambiguity of writing, foregrounding *sense* over *signification*. There is, perhaps, a danger here of romanticisation. This more primary "law of sociability" that was written in the squares cannot, in itself, secure the political, economic and moral conditions that those present campaigned for. Such rights and duties ultimately depend on the positive law's determinative capacity for enforcement. Nonetheless, the power of these events is to show another shade to the expression of legality and force us to construct new vocabularies to capture their tenor and form. Juriswriting is one such offering.

5.6 Jurisdiction and/or Juriswriting

Jurisdiction and juriswriting are both engaged in the expression of law, both name techniques that make a legal form known. Both are engaged in a particular logic of reflection and grounding, seeking to articulate a particular relation between an informal and formal legality. Juriswriting, however, differs from jurisdiction in important respects. Where jurisdiction relies on the supposed full presence of speech and a speaking subject (whether collective or otherwise), juriswriting embraces and underscores the absences and deferrals

⁸⁷ As Catherine Malabou reminds us, plasticity infers the possibility of *giving form* (as in plastic surgery) and *receiving form* (in the sense that clay in plastic) but also destroying form (as in plastic explosives). See Catherine Malabou, *Plasticity at the Dusk of Writing*, trans., Carolyn Shread (New York: Columbia University Press, 2010), 87, n. 13.

⁸⁸ In the European context, the most enduring effect of the occupation of public space is seen in Greece where the radical left party Syriza has become the main opposition party.

that haunt such a claim. Where jurisdiction seeks to articulate the “proper” relation between the community and law, or the “proper” relation between an informal *ius* by determining it as *lex*, juriswriting, by emphasising the temporality of *becoming* stresses the fluid and dynamic qualities to the legal form. Where jurisdiction presents the law *as if* it were already extant, seeking to efface both the prior movement that makes it possible and the contingencies of its history, juriswriting takes the risk of foregrounding the fiction and fantasy attached with the law, taking performance and enactment as its mode of address. Juriswriting is not concerned with feigning authority and unlike jurisdiction is not self-conscious about the groundlessness to positive law. Juriswriting names those techniques that, while acknowledging the very groundlessness of the law, nonetheless affirm the possibility of a law that has an organic relation to the bare sociability to which it always stands in relation. Importantly, where jurisdiction privileges the law that cuts and divides, that draws lines and carves up people, territory and things, juriswriting privileges the law to which we are all abandoned, the ontological axiom that modern law tries to do without, an inoperative law of our being-with-others in the world.

Does all this suggest that we can do without jurisdiction? Certainly not. As we suggested in our discussion of community, the formation of communities, with their concomitant jurisdictional logic, is inevitable. And jurisdictional techniques that erect borders, mobilising firm lines of demarcation backed by force are often necessary and offer a bulwark for the defence of a community’s values. What, then, of the relation between jurisdiction and juriswriting?

Juriswriting would name those efforts that put such jurisdictional practices in question, that interrupt the effort to naturalise and neutralise such practices, that reiterate their contingent and, thus ultimately groundless, authority. In the 1980s Lacoue-Labarthe and Nancy re-affirmed the necessity to question and re-work our understanding of the political (*le politique*) rather than focus on the everyday joshing and positioning of politics (*la politique*). There is no sense that their analysis calls for the jettisoning of politics, rather they sought to emphasise that politics itself is conditioned by the political, by a series of assumptions about the proper space and ground for political action, decision and engagement. In a similar way, juriswriting would represent a restless reminder to reconnect

the law to its social and ontological foundations, to hold such “foundations” in question and from here to interrupt, resist and challenge that law that acts as if it can do without them.

The insistence of both jurisdiction and juriswriting is particularly evident in the Occupy camps. Though embracing the kind of difference and openness that we have assessed above, jurisdictional assertions were still present. For example, the Occupy Wall Street camp in Zuccotti Park had to confront the dangers and difficulties associated with the openness of the encampment. As Mulqueen and Tataryn point out, in order to offer protection for potentially vulnerable people and to dissuade drug dealers from operating within the camp, ‘participants found themselves in the paradoxical position of having to set up a security committee to monitor activity in the park’.⁸⁹ Regardless of the open mode of expression that the occupy movement mobilised, the question of policing its limits inevitably arose. However, the continual un-working of jurisdictional lines was precisely what the movement kept in play, confronting the ‘permeability of the borders and boundaries of the movement and the physical space that they occupied’.⁹⁰ It is this suspension of the legal limit and the holding of strict determination in question that connects the camps and squares to writing, to a movement that is always exceeding its own parameters.

Let me address a couple of concerns that might be felt with regards to juriswriting. Firstly, it might be supposed that these practices could be utilised for any political end; juriswriting, could perhaps, be utilised in the pursuit of nationalistic or fascistic endeavours. Nationalism and fascism are, at bottom, rooted in essentialism, orientating themselves around a closed and pre-determined sense of togetherness: an ethnic identity or a myth of national superiority. The notion of writing that animates juriswriting names the very movement that makes such assertions impossible. We must, as Derrida reminds us, ‘be several in order to write’.⁹¹ The unifying communion of nationalism with its myths of purity and integrity denies this plurality from the off. Wall says of right-ing, and the same can be claimed for juriswriting, that nationalistic groups ‘make community itself operative and perform the sacrificial logic of sovereignty... theirs is not a right-ing by any stretch of the imagination’.⁹²

⁸⁹ Mulqueen and Tataryn, “Don’t Occupy this Movement,” 294.

⁹⁰ Ibid., 295.

⁹¹ Derrida, *Writing and Difference*, 284.

⁹² Wall, *Human Rights and Constituent Power*, 144.

Secondly, if juriswriting, like right-ing, does without a teleological orientation does this not side juriswriting with a kind of “anything goes” postmodernism in which no (grand) narratives can be mobilised? In Blanchot’s short story *The Madness of the Day*,⁹³ the narrator asserts, at the story’s close, what might be construed as the nihilism associated with this denial of narrative. Blanchot’s text is an infuriating but virtuosic meditation on narrative fiction, in many respects, enacting the theory of writing that we sketched out above. The story is constantly holding itself in abeyance, denying the reader the satisfaction of clear plotting. As Derrida has argued, the text performs the impossibility of any text being closed or unified, affirming instead a kind of anarchy of textuality.⁹⁴ The story – to be brutal to this play for a moment – tells of a bout of madness which results in (though we know not how nor why) glass being crushed into the narrator’s eyes. This is followed by the narrator’s incarceration in a hospital where he frustrates the doctors – cast as representatives of the law – by being unable to tell the narrative of how this came to pass. The story is never fully drawn out, rather it folds in on itself performing what Derrida describes as a ‘chiasmic double invagination’.⁹⁵ The opening lines, ‘I am not learned; I am not ignorant. I have known joys. That is saying too little....’ are repeated at the end of the story when the narrator is pushed to give an account of how he sustained the injuries to his eyes:

Tell us “just exactly” what happened. A story? I began: I am not learned; I am not ignorant. I have known joys. That is saying too little. I told them the whole story and they listened... But the end was a surprise to all of us. “That was the beginning,” they said. “Now get down to the facts.” How so? The story was over!... [They] remained firmly convinced, I am sure, that a writer, a man of distinction, is always capable of recounting the facts that he remembers. A story? No. No stories never again.⁹⁶

The denial of narrative here is not absolute. Rather like Derrida in “Ellipsis,” Blanchot occupies the narrative – the subtitle of one version of the piece, it must be remembered, is itself *un récit* or “a story”⁹⁷ – but this story is written otherwise. A writer’s denial of narrative is itself an affirmation of story telling: *as if* a writer could do without stories. Rather than abandon narrative all together Blanchot reaches beyond the limits of narrative

⁹³ Maurice Blanchot, *The Madness of the Day* trans., Lydia Davis (New York: Station Hill Press, 1981).

⁹⁴ Jacques Derrida, “The Law of Genre” in *Acts of Literature* Derek Attridge ed. (London: Routledge, 1992), 223-252.

⁹⁵ Derrida, “The Law of Genre,” 236-238..

⁹⁶ Blanchot, *The Madness of the Day*, 18.

⁹⁷ The publication in *Tri-Quarterly* 40 (1977) included this as a subtitle. For a discussion of the significance of this title see Derrida, “The Law of Genre,” 239-243.

and re-inscribes this beyond within the narrative form, testing the plasticity of story telling. Blanchot's "no" or refusal of narrative, then, must be read together with a "yes" or affirmation of writing which in turn is a yes to stories, just not stories as we might commonly understand them.

We should understand juriswriting's disavowal of teleology in a similar fashion. To affirm play and open possibility and defer the making of strict limits and concrete claims is not the disavowal of determinate action *tout court*. Juriswriting interrupts the law's narrative of stability, sovereignty and natural authority but in so doing it affirms rather than denies the possibility of telling a different story of the legal form. This is narrative – to echo Wall's characterisation of right-ing – 'without model or warranty',⁹⁸ a narrative, then, without end.

5.7 Conclusion

Taking inspiration from both the events of 2011 and Douzinas and Wall's notion of right-ing, juriswriting is a creative praxis and names certain strategies for making an inoperative or *différential* law of sociability known. I have sought to offer a grounding for this notion by reference to a deconstructive understanding of writing. Following Blanchot, Nancy and – in particular – Derrida, we can see that certain writing practices foreground the difference and deferral that is writing's condition of possibility. In the context of jurisdiction, we can read these practices of writing, what I call juriswriting, as those that express the law but do so without reference to sovereign authorship or the marking of strict lines of determination. Like Freud, Jabès, Blanchot and others, such practices play with writing's own excesses, privileging sense over signification.

Jurisdiction is commonly associated with making the law's limits known and understood. But as we have said from the outset, jurisdiction too must reflect an extant, but informal set of relations. Juriswriting reverses that which is privileged by jurisdiction. Rather than focus on the line drawing obsessions of the cartographer or judge, juriswriting privileges the sense of law as an originary sociability that is reflected in the jurisdictional moment. The events of 2011 not only provoke us to reconsider the form that jurisdiction might take but also give us a sense of the styles of (juris)writing that might be mobilised in order to reveal this prior category of the law. Beyond the traditional variants of critique that expose

⁹⁸ Wall, *Human Rights and Constituent Power*, 143.

transcendental conditions of possibility; inherent contradictions and *aporias*; or undertake an immanent critique of the operations of power within the social fabric, juriswriting points to the necessity for critical and creative *intervention* within the law and its expressive register.⁹⁹ Juriswriting offers a corrective to the traditional operation of jurisdiction and its mobilisation by State power. Juriswriting is a strategy of intervention that expresses the law otherwise, writing the inoperative “with” on which jurisdictional claims ultimately rest.

⁹⁹ For an assessment of the various forms critique might take in a legal context see, Costas Douzinas, “Oubliez Critique,” *Law and Critique* (2005) 16(1), 47–69. Douzinas’s analysis is instructive: in an injunction for political intervention and engagement Douzinas suggests that we forget critique because it is ‘by forgetting (the dominant types of) critique that we might be able to defy the law’(69).

Bibliography

Abraham, Nicolas and Maria Torok. *The Wolf Man's Magic Word: A Cryptonymy*. Minneapolis: University of Minnesota Press, 1986.

Abul-Magd, Zeinab. "Occupying Tahrir Square: The Myths and the Realities of the Egyptian Revolution" *The South Atlantic Quarterly* 111(3) (2012): 565-572.

Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Stanford: Stanford University Press, 1998.

Agamben, Giorgio. *The Coming Community*. Translated by Michael Hardt. Minneapolis: University of Minnesota Press, 2007.

Agamben, Giorgio. *The State of Exception*. Translated by Kevin Attell. Chicago: Chicago University Press, 2005.

Austin, John L. *How To Do Things With Words*. Cambridge, MA: Harvard University Press, 1962.

Badiou, Alain. "Open Letter Reply to Jean-Luc Nancy's 'What the Arab Peoples Signify to Us.'" Accessed May 21, 2012. <http://www.criticallegalthinking.com/?p=2899>.

Badiou, Alain. *The Rebirth of History: Times of Riots and Uprisings*. London: Verso, 2012.

Baker, John H. *An Introduction to English Legal History*. 4th edition. London: Butterworths, 2002.

Balkin, J. M. "Deconstructive Practice and Legal Theory" *The Yale Law Journal* 96(4) (1987): 743-786.

Bataille, Georges. "The Psychological Structures of Fascism." In *Visions of Excess*, edited by Allan Stoek. Minneapolis: University of Minnesota Press, 1985.

Bartlett, Richard. "Another Triumph for the Common Law," *Sydney Law Review* 15(2) (1993): 178-186.

Beardsworth, Richard. *Derrida and the Political*. London: Routledge, 1996.

Bell, Vikki. *Culture and Performance: The Challenge of Ethics, Politics and Feminist Theory*. Oxford: Berg, 2007.

Benjamin, Walter. *The Arcades Project*. Translated by Howard Eiland. New York: Belknap Press, 2002.

Bennington, Geoffrey. *Jacques Derrida*. Chicago: Chicago University Press, 1993.

Bennington, Geoffrey. "Deconstruction is not what you think," *Art and Design*, 4(3/4) (1988): 6-7.

Bentham, John. *A Comment on the Commentaries*. Edited by C.W. Everett. Oxford: Clarendon Press, 1928.

Bentham, John. *A Fragment on Government with An Introduction to the Principles of Morals and Legislation*. Oxford: Basil Blackwell, 1948.

Blackstone, William. *Commentaries on the Laws of England*. London: T Cadell and W Davies, 1809.

Blanchot, Maurice. "Literature and the Right to Death" in *The Work of Fire*. Translated by Charlotte Mandell. Stanford: Stanford University Press, 1995: 300-344.

Blanchot, Maurice. *Political Writings, 1953-1993*. Translated by Zakir Paul. New York: Fordham University Press, 2010.

Blanchot, Maurice. *The Infinite Conversation*. Translated by Susan Hanson. Minneapolis: University of Minnesota Press, 2013.

Blanchot, Maurice. *The Madness of the Day*. Translated by Lydia Davis. New York: Station Hill Press, 1995.

Blanchot, Maurice. *The Unavowable Community*. Translated by Pierre Jorris. New York: Station Hill Press, 1988.

Blanchot, Maurice. *The Writing of the Disaster*. Translated by Ann Smock. Lincoln: University of Nebraska Press, 1995.

Brink, David. "Legal Interpretation, Objectivity and Morality." In *Objectivity in Law and Morals*. Edited by Brian Leitner. Cambridge: Cambridge University Press, 2001: 12-65.

Brooks, Peter. *Reading for the Plot: Design and Intention in Narrative*. Cambridge MA: Harvard University Press, 1984.

Broom, Herbert. *Constitutional Law Viewed in Relation to Common Law*. London: W. Maxwell and Sons, 1885.

Brown, Wendy. "Sovereign Hesitations." In *Derrida and the Time of the Political*, edited by Pheng Cheah and Suzanne Guerlac. London: Duke University Press, 2009: 114-133.

Butler, Judith. *Bodies That Matter: On The Discursive Limits of Sex*. London: Routledge, 1993.

Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity*. Abingdon: Routledge, 2008.

Cixous, Hélène. *Readings: The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva*. Minneapolis: University of Minnesota Press, 1991.

- Coke, Edward. *The Reports*. London: Joseph Butterworth and Son, 1826.
- Cormack, Bradin. *A Power to do Justice: Jurisdiction, English Literature and the Rise of the Common Law 1509-1625*. Chicago: The University of Chicago Press, 2007.
- Cornell, Drucilla. *The Philosophy of the Limit*. New York : Routledge, 1992.
- Costa, Pietro. *Iurdictio: Semantica del Potere Politico nel Pubblicistica Medievale (1100-1433)*. Milan: Giuffrè, 2002.
- Cotterrell, Roger. *Law's Community: Legal Ideas in Sociological Perspective*. Oxford: Clarendon Press, 1995.
- Cover, Robert. "The Supreme Court, 1982 Term – Foreword: *Nomos* and Narrative," *Harvard Law Review* 97 (4) (1983).
- Cover, Robert. "Violence and the Word." *Yale Law Journal* 95 (1986): 1601-1629.
- Crisis Group. "Popular Protest in North Africa and the Middle East (V): Making Sense of Libya." Accessed 6 June, 2011, <http://www.crisisgroup.org/en/regions/middle-east-north-africa/north-africa/libya.aspx>.
- Critchley, Simon. *The Ethics of Deconstruction*. Oxford: Blackwell, 1992.
- Dargo, George. "Reclaiming Franz Kafka, Doctor of Jurisprudence." *Brandies Law Journal* 45(3) (2006-7): 495-526.
- Davies, Margaret. *Delimiting the Law: Postmodernism and the Politics of the Law*. London: Pluto Press, 1996.
- de Ville, Jacques. *Law as Absolute Hospitality*. Abingdon: Routledge, 2011.
- Derrida, Jacques. *A Gift of Death*. Chicago: Chicago University Press, 1995.

Derrida, Jacques. *A Taste for the Secret*. Cambridge: Polity, 2001.

Derrida, Jacques. *Acts of Literature*. Edited by Derek Attridge. London: Routledge, 1992.

Derrida, Jacques. *Acts of Religion*. New York: Routledge, 2002.

Derrida, Jacques. *Adieu to Emmanuel Levinas*. Stanford: Stanford University Press, 1999.

Derrida, Jacques. "Declarations of Independence." In *Negotiations: Interviews and Interventions 1971-2001*, translated by Elizabeth Roudinesco. Stanford: Stanford University Press, 2002: 46-54.

Derrida, Jacques. *Margins of Philosophy*. Translated by Alan Bass. Brighton: Harvester Press, 1982.

Derrida, Jacques. Foreword to *The Wolf Man's Magic Word: A Cryptonymy*, by Nicolas Abraham and Maria Torok. Minneapolis: University of Minnesota Press, 1986.

Derrida, Jacques and Elisabeth Roudinesco. *For What Tomorrow... : A Dialogue*. Stanford, Stanford University Press, 2004.

Derrida, Jacques. *Limited Inc.* Translated by Samuel Weber. Evanston: Northwestern University Press, 1988.

Derrida, Jacques. *Of Grammatology*. Translated by Gayatri Spivak. Baltimore: Johns Hopkins University Press, 1997.

Derrida, Jacques. *Of Hospitality*. Stanford: Stanford University Press, 2000.

Derrida, Jacques. *On Touching: Jean-Luc Nancy*, translated by Christine Irizarry. Stanford: Stanford University Press, 2005.

Derrida, Jacques *Parages*. Stanford: Stanford University Press, 2011.

Derrida, Jacques . "Remarks on Deconstruction and Pragmatism." In *Deconstruction and Pragmatism*. Edited by Chantal Mouffe. London: Routledge, 1996: 79-91.

Derrida, Jacques. *Rogues: Two Essays on Reason*. Translated by Pascale-Anne Brault. Stanford : Stanford University Press, 2005.

Derrida, Jacques. "Some Statements and Truisms about Neologisms, Newisms, Postisms, Parasitisms, and Other Small Seismisms," in *The States of "Theory:" History, Art, and Critical Discourse*. Edited by D. Carroll. New York: Columbia University Press, 1990.

Derrida, Jacques. *Spectres of Marx: The State of Debt and the Work of Mourning*. Translated by Peggy Kamuf. Oxon: Routledge, 1994.

Derrida, *Speech and Phenomena*. Translated by David B. Allison. Evanston: Northwestern University Press, 1973.

Derrida, Jacques. "The Force of Law: The Mystical Foundation of Authority." In *Acts of Religion*. Edited by Gil Anidjar. London: Routledge, 2010: 230-298.

Derrida, Jacques. *The Gift of Death*. Translated by David Wills. Chicago: University of Chicago Press, 1995.

Derrida, Jacques. *The Other Heading*. Translated by Pascale-Anne Brault and Michael Naas. Bloomington: Indiana University Press, 1992.

Derrida, Jacques. *The Politics of Friendship*. Translated by George Collins. London: Verso, 2005.

Derrida, Jacques. "The Time is Out of Joint." In *Deconstruction is/in America: A New Sense of the Political*. Edited by Alselm Haverkamp. New York: New York University Press, 1995.

Derrida, Jacques. "Women in the Beehive: A Seminar with Jacques Derrida," *Differences: A Journal of Feminist Cultural Studies* 16 (2005): 139-157.

Derrida, Jacques. *Writing and Difference*. Translated by Alan Bass. London: Routledge, 2008.

Derrida, Jacques and Maurizio Ferraris. *A Taste for the Secret*. Translated by Giacomo Donis. Cambridge: Polity, 2001.

Detmold, Michael. "Law and Difference: Reflections on Mabo's Case" *Sydney Law Review* 15(2) (1993): 159-167.

Dorsett, Shaunnagh. "Mapping Territories" in *Jurisprudence of Jurisdiction* edited by Shaun McVeigh. Abingdon: Routledge, 2007: 137-158.

Dorsett, Shaunnagh. "Since Time Immemorial: A Story of Common law Jurisdiction, Native Title and the Case of Tanistry" *Melbourne University Law Review* 26(1) (2002): 32-59.

Dorsett Shaunnagh and McVeigh, Shaun. "Conduct of Laws: Native Title, Responsibility and Some Limits of Jurisdictional Thinking," *Melbourne Law Review* 36(2) (2012): 470-493.

Dorsett, Shaunnagh and Shaun McVeigh. *Jurisdiction*. Abingdon: Routledge, 2012.

Dorsett, Shaunnagh and McVeigh, Shaun. "Just So: 'The Law That Governs Australia is Australian Law.'" *Law and Critique* 13(3) (2002): 289-309.

Douzinas, Costas. *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*. London: Routledge, 2007.

Douzinas, Costas. "Metaphysics of Jurisdiction." In *Jurisprudence of Jurisdiction*, edited by Shaun McVeigh. Abingdon: Routledge, 2007: 21-32.

Douzinas, Costas. "Oubliez Critique." *Law and Critique* 16(1) (2005): 47-69.

Douzinas, Costas. *Philosophy and Resistance in the Crisis*. London: Polity, 2013.

Douzinas, Costas. "Stasis Syntagma: The Names and Types of Resistance" in *New Critical Legal Thinking*. Edited by Matthew Stone, Illan rua Wall and Costas Dounzinas. Abingdon: Routledge, 2012: 32-45.

Douzinas, Costas. *The End of Human Rights: Critical Legal Thought at the Turn of the Century*. Oxford: Hart Publishing, 2000.

Douzinas, Costas and Geary, Adam. *Critical Jurisprudence*. Oxford: Hart Publishing, 2005.

Douzinas, Costas and Warrington, Ronnie. *Postmodern Jurisprudence: The Law of text in the Texts of Law*. London: Routledge, 1991.

Dworkin, Ronald. *A Matter of Principle*. Cambridge MA: Harvard University Press, 1985

Dworkin, Ronald. *Law's Empire*. Oxford: Hart Publishing, 2012

Elden, Stuart. *The Birth of Territory*. Chicago and London: University of Chicago Press, 2013.

Ertür, Basak. "The Gezi Uprising and Particularities of Discontent" *Law and Critique* 25(1) (2014): 3-7.

Fitzpatrick, Peter. "Juris-fiction: Literature and the Law of the Law." *Ariel : A Review of International English Literature* 35(1-2) (2004).

Fitzpatrick, Peter. *Modernism and the Grounds of Law*. Cambridge: Cambridge University Press, 2001.

Peter Fitzpatrick. "No High Duty: *Mabo* and the Failure of Legal Foundation." *Law and Critique* 13(3) (2002): 233-252.

Ford, Richard. "Law's Territory (A History of Jurisdiction)," *Michigan Law Review* 97(4) (1998-1999): 843-930.

Fortescue, Sir John. *De Laudibus Legum Anglie*. Edited and translated by Stanley B Chrimes. Cambridge: Cambridge University Press, 1942.

Franchi, Stefano. "Passive Politics." *Contretemps* 5 (2004).

Fuller, Lon. *The Morality of Law*. New Haven: Yale University Press, 1969.

Gadamer, Hans-Georg. *Truth and Method*. London: Continuum, 2004.

Galloway, *The Union of England and Scotland, 1603-1608*. Edinburgh: John Donald, 1986.

Gaon, Stella. "Communities in Question: Sociality and Solidarity in Nancy and Blanchot." *Journal for Cultural Research*, 9(4) (2005): 395-403.

Goodrich, Peter. "Critical Legal Studies in England: Prospective Histories." *Oxford Journal of Legal Studies* 12(2) (1992): 205-206.

Goodrich, Peter. "Eating Law: Commons Common Land, Common Law." *Journal of Legal History* 12(3) (1991): 246-267.

Goodrich, Peter. *Languages of Law: From Logics of Memory to Nomadic Masks*. London: Winfield and Nicholson, 1990.

Goodrich, Peter. *Law in the Courts of Love: Literature and Other Minor Jurisprudences*. London: Routledge, 1996.

Goodrich, Peter. "Visive Powers: Colours, Trees and Genres of Jurisdiction," *Law and Humanities* 2(2) (2008): 213-231.

Goodrich, Peter Haramovitch, Yifat and Douzinas, Costas, editors. *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent*. London: Routledge, 1994.

Grantham, Bill. "Embracing Jurisdiction: John Ford's *The Man Who Shot Liberty*" in *Jurisprudence of Jurisdiction* edited by Shaun McVeigh. Abingdon: Routledge, 2007: 225-237.

McVeigh, Shaun. "Law as (More or Less) Itself: On Some Not Very Reflective Elements of Law" *Irvine Law Review* (forthcoming, 2014).

Hägglund, Martin. *Radical Atheism: Derrida and the Time of Life*. Stanford: Stanford University Press, 2008.

Hale, Matthew. *The History of the Common Law of England*. Chicago: University of Chicago Press, 1971.

Hannafin, Patrick. "Constitutive Fiction: Postcolonial Constitutionalism in Ireland." *Penn State International Law Review* 20(2) (2001): 329-338.

Hannafin, Patrick. "The Writer's Refusal and the Law's Malady" *Journal of Law and Society* 31(1) (2004): 3-14.

Hart, H.L.A. "Positivism and the Separation of Laws and Morals" *Harvard Law Review* 71(4) (1957-58): 593-629.

Hart, H.L.A. *The Concept of Law*. Oxford: Oxford University Press, 1997.

Heidegger, Martin. "Letter on Humanism." In *Basic Writings*, edited by David Farrell Krell. London: Routledge, 2011: 147-181.

Heidegger, Martin. *Poetry, Language, Thought*. Translated by Albert Hofstadter New York: HarperCollins, 1997.

Hill, Leslie. *Blanchot: Extreme Contemporary*. London: Routledge 1997.

Hobbes, Thomas. *Leviathan*. Indianapolis, Hackett Publishing, 1994.

Howell, Thomas B, editor. *A Complete Collection of State Trials*. London: Longman, 1809-26.

Hunt, Alan editor. *Reading Dworkin Critically*. Oxford: Berg Publishers, 1992.

James, Ian. *The Fragmentary Demand: An Introduction to the Philosophy of Jean-Luc Nancy*. Stanford: Stanford University Press, 2006.

Joyce, Richard. *Competing Sovereignties*. Abingdon : Routledge, 2013.

Kafka, Franz. *The Trial*. Translated by Willa Muir and Edwin Muir. London: Everyman's Library, 1992.

Kafka, Franz. "Before the Law." In *The Complete Short Stories of Franz Kafka*. London: Vintage, 1999.

Kahn, Paul W. *The Cultural Study of Law*. Chicago: Chicago University Press, 1999.

Kantorowicz, Ernst. *The King's Two Bodies: A Study in Medieval Political Theology*. Princeton: Princeton University Press, 1957.

Kellogg, Catherine. *Law's Trace: From Hegel to Derrida*. Abingdon: Routledge, 2010.

Kelsen, Hans. *The Pure Theory of Law*. Berkeley: University of California Press, 1967.

Laclau, Ernesto and Chantal Mouffe. *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*. London: Verso, 2001.

Lacoue-Labarthe, Philippe and Jean-Luc Nancy. *Retreating the Political*. Edited by Simon Sparks. London: Routledge, 1997.

Lawrence, David H. *Study of Thomas Hardy and Other Essays*. Cambridge: Cambridge University Press, 1985.

Legendre, Pierre. "The Judge Amongst the Interpreters: Psychoanalysis and Legal Judgment" in *Law and the Unconscious: A Legendre Reader*. Translated by Peter Goodrich, Alain Pottage and Anton Schütz. New York: St Martin's Press, 1997.

Levinas, Emmanuel. *Otherwise Than Being*. Pittsburgh: Duquesne University Press, 1998.

Levinas, Emmanuel. *Totality and Infinity: An Essay on Exteriority* Pittsburgh: Duquesne University Press, 1969.

Loizidou, Elena. "Before the Law, Encounters at the Borderline". In *New Critical Legal Thinking*. Edited by Stone, Wall and Douzinas. Abingdon: Routledge, 2012: 181-197.

Loizidou, Elena. *Judith Butler: Ethics, Law, Politics*. Abingdon: Routledge, 2007.

Luhmann, Niklas. "Law as a Social System." *Northwestern University Law Review*, 83 (1989): 136-150.

MacNeice, Louis. *Collected Poems*. London: Faber & Faber, 2002.

Maitland, Frederick W and Montague, Frances C. *A Sketch of English History*. Clark: The Lawbook Exchange, 2010.

Malabou, Catherine. *Plasticity at the Dusk of Writing*. Translated by Carolyn Shread. New York: Columbia University Press, 2010.

Malabou, Catherine and Derrida, Jacques. *Counterpath: Travelling with Jacques Derrida*. Stanford: Stanford University Press, 2004.

Matthews, Daniel and Tzanakopoulos, Dimitrios. "Theory Engaged: Perspectives of Discontent" *Matthews Law and Critique*, 23(3) (2012): 183-311.

Mason, Paul. *Why It's Kicking Off Everywhere: The New Global Revolutions*. London: Verso, 2012.

Michelfelder, Diane P. and Palmer, Richard, E editors. *Dialogue and Deconstruction: The Gadamer-Derrida Encounter*. New York: State University of New York Press.

Michelman, F. "Postmodernism, Proceduralism, and Constitutional Justice: A Comment on Van der Walt and Botha" *Constellations* 9 (2002): 246-262.

Miller, Joseph H. *For Derrida*. New York: Fordham University Press, 2009.

Minow, Martha et al, ed. *Narrative, Violence and the Law: The Essays of Robert Cover*. Ann Arbor: University of Michigan Press, 1992.

Morin, Marie-Eve. "Putting Community Under Erasure: Derrida and Nancy on the Plurality of Singularities." *Culture Machine* 8 (2006). Accessed December, 19, 2012. <http://www.culturemachine.net/index.php/cm/article/viewArticle/37/45>.

Motha, Stewart. "Guantanamo Bay, Abandoned Being and the Constitution of Jurisdiction". In *Jurisprudence of Jurisdiction*. Edited by Shaun McVeigh. Abingdon: Routledge, 2007: 63-83.

Motha, Stewart. "The End of Sovereignty, in North Africa, in the World." Accessed April 19, 2011. <http://www.criticallegalthinking.com/?p=3007>.

Motha, Stewart. "The Failure of 'Postcolonial' Sovereignty in Australia" *Australian Feminist Law Journal* 22 (2005): 107-126.

Motha, Stewart. "The Sovereign Event in a Nation's Law." *Law and Critique* 13(3) (2002): 311-338.

Motha, Stewart and Zartaloudis, Thanos. "Law, Ethics and the Utopian End of Human Rights" *Social and Legal Studies* 12(2) (2003): 243-268.

Mussawir, Edward. *Jurisdiction in Deleuze: The Expression and Representation of Law*. Abingdon: Routledge, 2011.

Nancy, Jean-Luc. *A Finite Thinking*. Translated by Simon Sparks. Stanford: Stanford University Press, 2003.

Nancy, Jean-Luc. *Being Singular Plural*. Translated by Robert D Richardson and Anne E O'Byrne. Stanford : Stanford University Press, 2000.

Nancy, Jean-Luc. *A Finite Thinking*, edited by Simon Sparks. Stanford: Stanford University Press, 2003.

Nancy, Jean-Luc. "The Confronted Community." Translated by Amanda Macdonald. *Postcolonial Studies* 6(1) (2003): 23-36.

Nancy, Jean-Luc. *The Experience of Freedom*. Translated by Bridget McDonald. Stanford: Stanford University Press, 1993.

Nancy, Jean-Luc. *The Inoperative Community*. Translated by Peter Connor, Lisa Garbus, Michael Holland, and Simona Sawhney. Minneapolis: University of Minnesota, 2003.

Nancy, Jean-Luc. "The Political and/or Politics." Translated by Christopher Saunder. [Unpublished]

Nancy, Jean-Luc. *The Sense of the World*. Translated by Jeffrey S Librett. Minneapolis: University of Minnesota, 1997.

Nancy, Jean-Luc. "What the Arab Peoples Signify to Us." Accessed 21 May, 2012. <http://www.criticallegalthinking.com/?p=2793>

Norrie, Alan. "‘Simulacra of Morality’? Beyond the Ideal/Actual antinomies of Criminal Justice," in *Philosophy and the Criminal Law*. Edited by Antony Duff. Cambridge: Cambridge University Press, 1998.

Patton, Paul. "Poststructuralism and the Mabo Debate: Difference, Society and Justice" in *Justice and Identity: Antipodean Practices*, edited by Wilson and Yeatman. Wellington: Bridget Williams Books, 1995.

Peeters, Benoît. *Derrida: A Biography*, translated by Andrew Brown. Cambridge: Polity Press, 2013.

Pocock, John G. A. *The Ancient Constitution and the Feudal Law*. Cambridge: Cambridge University Press, 1957.

Postema, Gerald. *Bentham and the Common Law Tradition*. Oxford: Clarendon Press, 1989.

Povinelli, Elizabeth. *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*. Durham: Duke University Press, 2002.

Price, Polly. *Natural Law and Birthright Citizenship*, *Yale Journal of Law & the Humanities*. 9(1) (1997): 73-146.

Pryor, Benjamin. "Law in Abandon: Jean-Luc Nancy and the Critical Study of Law." In *Law and Critique* 15(3) (2004): 259-285.

Rancière, Jacques. "Should Democracy Come? Ethics and Politics in Derrida." In *Derrida and the Time of the Political*, edited by Pheng Cheah and Suzanne Guerlac. London: Duke University Press, 2009: 274-288.

Rancière, Jacques. *The Emancipated Spectator*. Translated by Gregory Elliott. London: Verso, 2011.

Reuters. "Anti-Gaddafi Figures Say Form National Council." Accessed 21 May, 2012, <http://www.reuters.com/article/2011/02/27/libya-council-revolution-idUSWEB194120110227>.

Ramadan, Adam. "From Tahrir to the World: The Camp as a Political Public Space" *European Urban and Regional Studies* 20(1) (2012): 145-151.

Royle, Nicholas. "What is Deconstruction" in *Deconstructions: A User's Guide*. London: Palgrave, 2000: 1-13.

Ryngaert, Cedric. *Jurisdiction in International Law*. Oxford: Oxford University Press, 2008.

Sarat, Austin. "Situating Law Between the Realities of Violence and the Claims of Justice." In *Law, Violence and the Possibility of Justice*, edited by Austin Sarat. Princeton: Princeton University Press, 2001: 3-14.

Sartre, Jean-Paul. *What is Literature?* Translated by Bernard Frechtman. New York: Philosophical Library, 1949.

Scheer, Edward editor. *Antonin Artaud: A Critical Reader*. London: Routledge, 2004.

Schmitt, Carl. *The Nomos of the Earth: In the International Law of the Jus Publicum Europaeum*. New York: Telos Press Publishing, 2006.

Schumacher, Claude and Singleton, Brian editors. *Artaud on Theatre*. London: Methuen Drama, 2001.

Searle, John. "Reiterating the Differences: A Reply to Derrida" *L'Aut Journal* 217-18 (1987): 200-210.

Shakespeare, William. *The Tragedy of Hamlet*. Oxford: Oxford University Press, 1998.

Stein, Peter. *Regulae Iuris: From Juristic Rules to Legal Maxims*. Edinburgh: Edinburgh University Press, 1966.

Stone, Matthew, Wall Illan rua and Douzinas, Costas. "Law, Politics and the Political" in *New Critical Legal Thinking: Law and the Political*. Edited by Stone, Wall and Douzinas. Abingdon: Routledge, 2012: 1-8.

Supoît, Alain. *Homo Juridicus: On the Anthropological Function of Law*. Translated by Saskia Brown. London: Verso, 2007.

Swift, Jonathan. *Gulliver's Travels*. Oxford: Oxford University Press, 2005.

Talibi, Karim. "Turkey's 'Standing Man' protest By Erdem Gündüz Spreads Across the Country," *Huffington Post*, 18 June 2013.

Tataryn, Anastasia and Tara Mulqueen. "Don't Occupy This Movement: Thinking Law in Social Movements." *Law and Critique* 23(3) (2012): 283-298.

Taylor, Astra. Keith Gessen, editors from *Triple Canopy* and *The New Inquiry n+1. Occupy! Scenes from Occupied America, Dissent*. London: Verso, 2011.

The Interim Transnational National Council. "Founding Statement of the Interim Transitional National Council." Accessed 6 April 2011, <http://ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council/>.

The Interim Transnational National Council. "Introducing the Council." Accessed 6 April, 2011, <http://ntclibya.org/english/about/>.

The Oxford English Dictionary. Oxford: Oxford University Press, 1991.

Thomson, Alex. *Deconstruction and Democracy: Derrida's Politics of Friendship*. London: Continuum, 2005.

UN Security Council. "UN Security Council Resolution 1973." Accessed 21 May, 2012, <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm#Resolution>.

Vaihinger, Hans. *The Philosophy of "As If": A System of the Theoretical, Practical and Religious Fictions of Mankind*. Translated by Charles K. Ogden. Mansfield Centre: Martino, 2009.

Veitch, Scott. *Law and Irresponsibility*. Abingdon: Routledge, 2007.

Wall, Illan rua. "A Different Constituent Power: Agamben and Tunisia" in *New Critical Legal Thinking*. Edited by Matthew Stone, Illan rua Wall and Costas Douzinas. Abingdon: Routledge, 2012: 46-66.

Wall, Illan rua. *Human Rights and Constituent Power: Without Model or Warranty* (Abingdon: Routledge, 2012).

Wall, Illan rua. "Notes on an "Open" Constituent Power" *Law Culture and the Humanities* (forthcoming). Available online (1743872113501840, first published on October 3, 2013). Accessed 8 March 2014.

Wall, Illan Rua. "Tunisia and the Critical Legal Theory of Dissensus." In *Law and Critique* 23(3) (2012): 219-236.

Wardop, Murray. "Occupy Protesters: Activists Deliver Charter of Grievances" *Daily Telegraph*. <http://www.telegraph.co.uk/news/uknews/8831851/Occupy-protests-activists-deliver-charter-of-grievances.html>. First published 17 October 2011. Accessed 25 May 2014.

Wittgenstein, Ludwig. *Tractatus Logico Philosophicus*. Translated by Charles K. Ogden. London: Routledge, 2005.

Young, Iris M. *Responsibility for Justice*. Oxford: Oxford University Press, 2011.

Zizek, Slavoj. *The Year of Dreaming Dangerously*. London: Verso, 2012.

Cases Cited

Calvin's Case (1608) 7 Co Rep 1a, 77 E.R. 377.

Mabo v Queensland (No. 2) (1992) 175 CLR.

New South Wales v The Commonwealth (1975) 135 CLR.

Yorta Yorta Aboriginal Community v State of Victoria (2002) 58 HCA.

Television and Film

Coen, Joel and Coen, Ethan. *True Grit*. (2010) Paramount Pictures.

Derrida, Jacques. "Interview with Alan Montefiore." Oxford Amnesty Lectures. (13 February 1992). Channel 4 (UK).

Dick, Kirby and Koffman, Amy. *Derrida* (2002), Zeitgeist Films.

